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VOLUME I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 340

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NELSON B. UPDIKE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 8241

UNITED STATES OF AMERICA, APPELLANT,
vs.
NELSON B. UPDIKE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 23, 1928.

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a United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant and Appellant,
No. 853 vs. Equity
Nelson B. Updike, et al., Defendants and Appellees.

Be it remembered, that on the dates hereinafter shown, certain papers were filed and record made and entered in the above entitled matter, in the words and figures following, to-wit:

1 Amended Bill of Complaint.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant,
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, Ed P. Smith, George A. Roberts, F. B. Johnson, Thomas Wolfe, Mary S. Updike, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, L. W. Schreiber, Isabella Thorpe, Jo Hamilton, Jos. P. McGrath, A. P. Murtagh, N. E. Murtagh, A. Pickens, Frank R. O'Neil, Henry Figard, Chas. Zinkey, B. R. Sloat, Alex T. Hart, Charles Figard, J. A. Dickinson, E. Stockham, S. S. Garvey, A. S. Tobey, Victoria Samuels, Edward A. Dusal, Frank L. Wood, George Loff, Bertha M. Bache, Mrs. A. H. Merchant, Mary Louise Jackson, J. B. Hill, J. Hervey Stout, Sarah Stout, Mrs. Nellie Goodwill, Grace E. Babcock, Mrs. J. L. Babcock, F. L. Babcock, F. O. Goodwill, F. J. Thatcher, Charles Howe, C. Arthur Howe, F. W. Aishton, F. A. Howard, Theodore E. Grow, Agnes Johnson, M. M. Betzner, C. J. Smyth, Hattie B. Updike, Lawrence B. Updike, Marjorie D. Updike, Clara McCardel, B. H. Updike, and Georgia E. Babcock, Defendants.

The complainant, United States of America, by its attorney, James C. Kinsler, United States Attorney for the District of Nebraska, complains of the above-named defendants and respectfully shows to the court:

I.

That at all times hereinafter mentioned the complainant was, and now is, a corporation sovereign and body politic.

II.

2 That at all times hereinafter mentioned the defendants, Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, Ed P. Smith, George A. Roberts, F. B. Johnson, Mary S. Updike, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, L. W. Schreiber, Isabella Thorpe, Jo Hamilton, Jos. P. McGrath, A. P. Murtagh, N. E. Murtagh, and Frank R. O'Neil, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, resident in, the Omaha division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

III.

That at all times hereinafter mentioned the defendants, Henry Figard, Chas. Zinkey, Alex T. Hart, J. A. Dickinson, A. S. Tobey, Victoria Samuels, Edward A. Dusal, and Thomas Wolfe, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, resident in, the Lincoln division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

IV.

That at all times hereinafter mentioned the defendants, B. R. Sloat, A. Pickens and E. Stockham, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, resident in, the Hastings division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

V.

That at all times hereinafter mentioned the defendant, Charles Figard, was, and now is, a citizen of the United States and of the State of Nebraska, and inhabitant of, resident in, the Grand Island division of said United States Dis-

trict Court in the State of Nebraska, within the jurisdiction of this court.

3

VI.

That at all times hereinafter mentioned, the defendant, S. S. Garvey, was, and now is, a citizen of the United States and of the State of Nebraska, and inhabitant of, resident in, the North Platte division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

VII.

That at all times hereinafter mentioned the defendants, Mrs. Nellie Goodwill, Grace E. Babcock, Mrs. J. L. Babcock, F. L. Babcock, F. O. Goodwill, F. J. Thatcher, Charles Howe, C. Arthur Howe, and F. W. Aishton, were, and now are, citizens of the United States and of the State of Illinois, and inhabitants of, and resident in, the Northern District of said United States District Court in the State of Illinois.

VIII.

That at all times hereinafter mentioned the defendant, F. A. Howard, was, and now is, a citizen of the United States and of the State of Missouri, and inhabitant of, and resident in, the Western District of said United States District Court in the State of Missouri.

IX.

That at all times hereinafter mentioned, the defendants, Theodore E. Grow and Agnes Johnson, were, and now are, citizens of the United States and of the State of Iowa, and inhabitants of, and resident in, the Southern District of said United States District Court in the State of Iowa.

X.

That at all times hereinafter mentioned the defendant, M. M. Betzner, was, and now is, a citizen of the United States and of the State of Iowa, and inhabitant of, and resident in, the Northern District of said United States District

4 Court in the State of Iowa.

XI.

That at all times hereinafter mentioned the defendant, C. J. Smyth, was, and now is, a citizen of the United States and of the District of Columbia, and inhabitant of, and resident in, the District of Columbia.

XII.

That at all times hereinafter mentioned the defendant, Bertha M. Bache, was, and now is, a citizen of the United States and the State of New York, and inhabitant of and resident in, the Southern District of said United States District Court of the State of New York.

XIII.

That at all times hereinafter mentioned the defendant, Mrs. A. H. Merchant, was, and now is, a citizen of the United States and of the State of Massachusetts, and inhabitant of, and resident in, the District of Massachusetts of said United States District Court in the State of Massachusetts.

XIV.

That at all times hereinafter mentioned the defendants, Mary Louise Jackson, J. B. Hill, J. Hervey Stout and Sarah Stout, were, and now are, citizens of the United States and of the State of New Jersey, and inhabitants of, and resident in, the District of New Jersey, of said United States District Court in the State of New Jersey.

XV.

That at all times hereinafter mentioned the defendant, Frank L. Wood was, and now is, a citizen of the United States and of the State of Wisconsin, and inhabitant of, and resident in, the Eastern District of said United States District Court in the State of Wisconsin.

XVI.

That at all times hereinafter mentioned the defendant,
5 George Loff, was, and now is, a citizen of the United States and of the State of Wyoming, and inhabitant of, and resident in, the District of Wyoming of said United States District Court in the State of Wyoming.

XVII.

That at all times hereinafter mentioned the defendants, Hattie B. Updike, Lawrence B. Updike, Marjorie D. Updike, Clara McCardel, and B. H. Updike, were and now are, citizens of the United States and of the State of California, and inhabitants of, and resident in, the Southern District of said United States District Court in the State of California.

XVIII.

That at all times hereinafter mentioned the defendant, Georgia E. Babcock, was, and now is, a citizen of the United States and of the State of Colorado, and inhabitant of, and resident in, the District of Colorado of said United States District Court in the State of Colorado.

XIX.

This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for Internal Revenue and the collection thereof.

XX.

Updike Grain Company was duly organized as a corporation on or about August 19, 1899, under the laws of the State of Nebraska, with a total paid-up capital stock of $500,000.00. In or about the year 1906 the capital stock was increased to one million dollars, and in or about the year 1917 the capital stock of said corporation was increased to two million dollars. That the total paid-up capital stock of said corporation at the time of its dissolution as hereinafter stated, and prior thereto, was two million dollars.

That the said corporation had its principal office and
6 place of business at the City of Omaha, in the State of Nebraska, and from said August 19, 1899 until on or about August 28, 1917, which was the date of its formal dissolution, as hereinafter described, said corporation was engaged in the business of receiving grain on consignment, storing, buying and selling and [deal] in grain.

XXI.

The above named defendants were all stockholders of the said corporation at the date of said dissolution and on and immediately before that date owned and held the following shares of stock of said corporation:

Names	Number of Shares Held
Nelson B. Updike	5887
Metta E. Updike	4020
N. B. Updike, Jr.	400
Hazel Updike Reasoner	400
Edward Updike	2940
Robert B. Updike	892
Gorton Roth	400
Eva T. Roth	400

	Otis M. Smith	364
	Joy M. Hackler	500
	Ed. P. Smith	200
	George A. Roberts	200
	F. B. Johnson	132
	Thomas Wolfe	100
	Mary S. Updike	73
	Winnifred S. Updike	20
	Lucy Updike	4
	L. Claude Hamilton	76
	F. C. Bell	20
7	R. Earl Miller	10
	L. W. Schreiber	84
	Isabella Thorpe	20
	Jo. Hamilton	28
	Jos. P. McGrath	10
	A. P. Murtagh	8
	N. E. Murtagh	2
	A. Pickens	100
	Frank R. O'Neil	50
	Henry Figard	40
	Chas. Zinkey	20
	B. R. Sloat	20
	Alex T. Hart	20
	Charles Figard	20
	J. A. Dickinson	20
	E. Stockham	10
	S. S. Garvey	10
	A. S. Tobey	5
	Victoria Samuels	4
	Edward A. Dusal	2
	Frank L. Wood	100
	George Loff	20
	Bertha M. Bache	40
	Mrs. A. H. Merchant	18
	Mary Louise Jackson	2
	J. B. Hill	72
	J. Hervey Stout	30
	Sarah Stout	10
	Mrs. Nellie Goodwill	20
	Grace E. Babcock	4
	Mrs. J. L. Babcock	320
8	F. L. Babcock	162
	F. O. Goodwill	160
	F. J. Thatcher	100
	Charles Howe	400

C. Arthur Howe	175
F. W. Aishton	250
F. A. Howard	81
Theodore E. Grow	50
Agnes Johnson	21
M. M. Betzner	110
C. J. Smyth	50
Hattie B. Updike	20
Lawrence B. Updike	10
Marjorie D. Updike	10
Clara McCardel	4
B. H. Updike	230
Georgia E. Babcock	20

XXII.

That on October 3, 1917, the Congress of the United States duly enacted a revenue law entitled "An Act to provide revenue to defray war expenses, and for other purposes" (40 Statutes at Large 300), hereinafter referred to as the Revenue Act of October 3, 1917; that said Act was in part an amendment of the provisions of the Revenue Act of 1916. That Section 214, Title II of said Revenue Act of October 3, 1917, repealed Title II (Sections two hundred to two hundred and seven inclusive) of the Revenue Act of March 3, 1917; provided for a war excess profits tax, and provided further, that any amount paid under Title II of the Act of March 3, 1917 should be credited on any amount due as war excess profits tax under said Act of October 3, 1917. That said Revenue Act of October 3, 1917 expressly provided that
9 the rates of taxes provided therein should relate back to, and be effective from January 1, 1917.

That by virtue of the provisions of said Revenue Act of October 3, 1917, said Updike Grain Company was required to make and file with the Collector of Internal Revenue for the District of Nebraska a return for its income and war income tax and a return for its excess profits tax for the taxable period ending June 30, 1917, and to pay the income, war income and excess profits taxes imposed upon said Updike Grain Company by said Revenue Act of October 3, 1917. That said Updike Grain Company failed, neglected and refused to file said return for its income and war income tax or said return for its excess profits tax or to pay its income, war income or excess profits tax as required by said Revenue Act of October 3, 1917.

XXIII.

That said Updike Grain Company conducted its business on a fiscal year basis; that its fiscal year commenced August 1 and ended July 31; that it discontinued business June 30, 1917; that upon its failure to make its income, war income or excess profits tax returns or either or any of them, as above set forth, the Commissioner of Internal Revenue directed that a review and audit be made by the Revenue Department of the books, records and accounts of said Updike Grain Company in order to determine the income, war income and excess profits tax liability of said Updike Grain Company to the complainant, United States of America, under the provisions of said Revenue Act of October 3, 1917, for said taxable period ending June 30, 1917. That as a result of said review and audit of the books, records and accounts of said Updike Grain Company, which review and audit were made during the month of October, 1918, in accordance with the provisions and requirements of said Revenue Act of October 3, 1917, said Revenue Department computed, determined and found that there was due from said Updike Grain Company to the complainant, United States of America, on account of the income, war income and excess profits tax liability of said Updike Grain Company to said complainant, United States of America, for said taxable period ending June 30, 1917, the sum of $373,911.54. And complainant says that there is due and owing to it, the said complainant, from said Updike Grain Company on account of the matters and things hereinbefore set forth the sum of $373,911.54, together with interest thereon, as provided by law, from the time said amount became due, and that no part of said principal or interest has been paid. That said Updike Grain Company received net taxable income in the sum of $2,174,330.64 during the eleven months taxable period ending June 30, 1917.

XXIV.

That the income, war income and excess profits of said Updike Grain Company and said income, war income and excess profits tax liability thereon by said Revenue Act of October 3, 1917, were computed and determined as follows, namely:

Net income as shown by books and records		$2,174,330.64
Less excess profits tax		459,081.32
Amount taxable at 2%		$1,715,249.32
Net income as shown above		$2,174,330.64
Less:		
Dividends	$590,142.26	
Excess profits tax	459,081.32	1,049,223.58
Balance		$1,125,107.06
Amount taxable at 4% (6/11 of $1,125,107.06)		$ 613,694.75
Excess profits tax		$ 459,081.32
Tax at 2%		34,304.99
Tax at 4%		24,547.79
		$ 517,934.10
Total tax due under Revenue Act of October 3, 1917		
Credits:		
Amounts previously assessed and paid under prior Revenue Acts—		
Tax under Act of September 8, 1916,	$47,439.94	
Tax under Act of March 3, 1917 (Repealed)	96,582.62	144,022.56
Balance of taxes due under Act of October 3, 1917		$373,911.54

XXV.

Complainant is informed and believes and therefore avers the same to be the fact as set forth in this paragraph, that on August 27, 1917, a meeting of the stockholders of said Updike Grain Company was had, at which meeting there were present fifty-nine stockholders of said corporation representing either in person, or by proxy, 19,746 shares of the capital stock of the said corporation,—the total number of shares issued and outstanding being 20,000 shares. At said meeting a resolution was duly adopted by stockholders representing more than two-thirds of the outstanding stock of the said corporation authorizing the officers and directors of said corporation to take such steps as would result in the voluntary liquidation of the corporation, and the transfer of its assets on such terms as would enable the corporation to retire all of its outstanding stock at par. The said resolution further provided for the surrender of all of the outstanding stock of the corporation upon the payment of each stockholder in cash the par value of his stock so surrendered. The said resolution also ratified and approved the action of the Board of Directors of said corporation taken and had on August 18, 1917, wherein the Directors resolved to voluntarily liquidate said corporation and distribute its assets among its stockholders. By said resolution the officers of said Up-

dike Grain Company were authorized and directed to execute the necessary Certificate of Dissolution and to file the same in the appropriate office. Said Certificate of Dis-
12 solution, after having been duly sworn to by N. B. Updike, President, and Gorton Roth, Secretary, on August 28, 1917, was duly filed in the office of the Secretary of State of the State of Nebraska on August 30, 1917, and was therein duly recorded in said office in Book 31, Miscellaneous Incorporations, at Page 610.

XXVI.

That immediately prior to said corporate dissolution of said Updike Grain Company, as the complainant is informed and believes, and therefore avers to be the fact, the said corporation had on hand cash and other assets aggregating two million dollars, or thereabouts, and said assets were forthwith and prior to the date of its formal dissolution by said corporation distributed amongst its stockholders, the above-named defendants, ratably according to their stockholdings of its shares of stock; that is to say each and every defendant received in cash or its equivalent an amount equal to $100.00 for each and every share of stock owned and held by him or her in said corporation. By reason of the said dissolution and distribution of all the assets and the property of the said Updike Grain Company as aforesaid to and amongst its stockholders as hereinbefore set forth, said corporation was left without money, assets or property of any kind with which to pay the said taxes due and owing to the United States, hereinbefore specifically set out, and the defendants, and each and every one of them received, as stockholders of said corporation, the entire money, assets and property of said Updike Grain Company as distributees charged with a trust in favor of the United States to the extent of the said taxes due and unpaid by it as hereinbefore set forth.

XXVII.

That the complainant has no plain, adequate or complete remedy at law against said Updike Grain Company or the defendants herein and therefore brings this suit in equity.

13 XXVIII.

That the Commissioner of Internal Revenue and the Attorney General of the United States authorizes and sanctions these proceedings.

XXIX.

Wherefore, in consideration of the facts herein [states] complainant, being without a plain, adequate, and complete remedy at law, comes before this court and prays:

1. That this Honorable Court order, adjudge, and decree that the aforesaid corporate assets of said Updike Grain Company so distributed to the defendants constitute a trust fund for the payment of said taxes due and owing by the said corporation to the United States, and that the said defendants shall account to this court for the aforesaid trust property, and that the fund aforesaid be applied to the payment of said taxes due and owing to the complainant.

2. That this Honorable Court order, adjudge and decree that the defendants be accountable to the complainant for the aforesaid taxes to the extent of the amount distributed to and received by them and each of them from the assets of the said corporation, and that each of the said defendants be ordered to pay to the complainant to the extent of the amounts distributed to and received by them from the assets of said Updike Grain Company, the amounts hereinabove shown to be due to the complainant for income, war income and excess profits taxes, together with interest at the legal rate from the date when the aforesaid taxes became due.

3. That complainant have such other, and further, and general relief as is just and equitable as well as a decree for costs.

And may it please the court to grant unto the complainant a writ of subpoena to the United States of America
14 issued out of and under the seal of this Honorable Court directed to the above-named defendants and commanding them on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court then and there to answer all and singularly the premises, answer under oath being expressly waived, and to stand to and perform and abide by such orders, directions and decrees as may be made against them in the premises, and complainant will ever pray.

JAMES C. KINSLER,
United States Attorney for the District of Nebraska.

Endorsed: Filed Apr. 28, 1927. R. C. Hoyt, Clerk.

15 Amendment to Paragraph XIX of Amended Bill of Complaint.

United States District Court for the District of Nebraska, Omaha Division.

United States of America, Complainant,
Number 853 vs. Equity.
Nelson B. Updike, et al., Defendants.

Now comes the complainant, and with leave of Court, amends Paragraph XIX of Complainant's Amended Bill of Complaint by striking out the following words, namely:" arising under a law of Congress providing for Internal Revenue and the collection thereof", so that said Paragraph XIX, as now amended, will read "This is a suit in equity brought by the United States of a civil nature."

JAMES C. KINSLER,
United States Attorney for the District of Nebraska.

Endorsed: Filed Mar. 28, 1928, R. C. Hoyt, Clerk.

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16 Answer of Ed. P. Smith.

Comes now Ed. P. Smith, one of the defendants herein, and for a separate answer to the amended bill of complaint filed herein states:

I.

For the purpose of this answer, this defendant admits the allegations of paragraphs 1 to 20 inclusive of the amended bill of complaint, and also admits the allegations of paragraph 25 thereof.

II.

This defendant has neither knowledge nor information sufficient to enable him to form a belief as to the truth of the allegations of fact contained in said amended bill of complaint not hereinbefore expressly admitted to be true, and therefore denies the same and each thereof.

III.

He alleges that many of the said allegations of fact in said amended bill of complaint not herein expressly admitted to be true are based wholly upon official records in the custody and control of the Commissioner of Internal Revenue at Washington, D. C. or of the Collector of Internal Revenue at

Omaha, Nebraska. This defendant has applied to each of said officers for copies of such of said records as are in their possession respectively, has offered to pay the charges and cost thereof, but his request has been refused. As a re-
17 sult of said refusal, this defendant cannot attach to this answer copies of said records and proceedings hereinafter referred to, nor state the exact contents thereof, and is forced to base his allegations relative thereto upon information and belief.

First Defense.

For his first defense to the amended bill of [complainant], this defendant alleges, that at all times during the year 1917, and during the corporate existence of the Updike Grain Company, Nelson B. Updike was its president, Elmer A. Cope was its treasurer and Gorton Roth was its secretary; that the Updike Grain Company was a corporation, organized under the laws of the State of Nebraska, operating on a fiscal year basis, its fiscal year ending July 31st of each year; that immediately after the close of its fiscal year in 1917, said corporation duly filed in the manner provided by law, and with the proper officials of the United States Government, its report of its net earnings for the fiscal year ending July 31, 1917, showing net earnings during said period of $2,371,-997.05, and paid its tax then due thereon in the sum of approximately $143,000.00; that said Updike Grain Company discontinued business on the 31st day of July, 1917, and on or about the 18th day of August, 1917, said corporation was dissolved in the manner provided by the laws of the State of Nebraska, its assets in their entirety were transferred to the said Nelson B. Updike, who in consideration therefor, agreed to, and did provide sufficient cash, or its equivalent to pay to each stockholder in said corporation, a sum equal to the par value of the stock so held by such stockholder in said corporation.

This defendant alleges, that after the enactment by the Congress of the United States of the Revenue Act of 1917 referred to in paragraph 22 of the amended bill of complaint herein, and to-wit: on or about the 1st day of March
18 1918, demand was made of the former President and Secretary of the Updike Grain Company that an additional and further return be filed in the name of the Updike Grain Company showing the entire net income of said Grain Company for the year 1917. This defendant is advised and states the fact to be, that because of the dissolution of said

corporation as hereinbefore referred to, and for reasons which the said Nelson B. Updike and Gorton Roth deemed good and sufficient, and acting in good faith, with no intent to deceive or evade the payment of any just or legal assessment of taxes then assessed, or that might after be assessed against the said Updike Grain Company, further or additional return of the net earnings of said Updike Grain Company for the year 1917 was not made.

This defendant is advised and alleges the fact to be, that thereafter, to-wit: in October 1918, duly constituted and legal representatives of the Internal Revenue Department of the Complainant herein, but whose names this defendant is unable to state because of the refusal of the Commissioner of Internal Revenue to give to this defendant the copies of said records hereinbefore referred to, but who he alleges were duly authorized representatives of said Internal Revenue Department and Deputy Collectors of Internal Revenue for the State of Nebraska duly constituted and appointed as such in the manner provided by law, made investigation and audit of the net income of the Updike Grain Company for the year 1917; that after making said audit and investigation and reducing the same to writing, the same was forwarded to the Commissioner of Internal Revenue, together with an amended return showing the net income of the Updike Grain Company for the year 1917 to be approximately $200,000.00 less than had theretofore been reported by the said Updike Grain Company.

19 This defendant is advised and alleges the fact to be that said audit, report and amended return as aforesaid so made by the said representative of said Department were received by the Commissioner of Internal Revenue at Washington, were in all respects by him ratified confirmed and approved, were accepted and filed as an amended return of the income of the Updike Grain Company, was then signed, endorsed and approved as such amended return made by the said Commissioner of Internal Revenue on information obtained by him as provided by law, and thereafter, to-wit: on or about the 15th day of January, 1920 said Commissioner of Internal Revenue on the information then before him obtained in the manner provided by law found and determined that there was due to the Complainant herein, from the said Updike Grain Company on account of war income and excess profits for the year 1917, a certain definite sum, the amount of which this defendant cannot state because of his inability to secure copies of said records.

He alleges, that after making said return, and from the information thus obtained as provided by law, the said Commissioner of Internal Revenue in January, 1920, made and entered of record in his office at Washington, D. C., an assessment against the Updike Grain Company, as, and for war income and excess profits taxes for the year 1917 in a certain definite sum and amount, which amount it is impossible for this defendant to state because of his inability to get a copy of said record, but which amount this defendant alleges represented the balance then claimed to be due from the Updike Grain Company as found, determined and assessed by said Commissioner of Internal Revenue on account of war income and excess profits taxes due from the Updike Grain Company on account of net profits, war income and excess profits taxes for the year 1917. He alleges that immediately thereafter, a notice of said assessment and a certified copy thereof showing the amount so assessed against the Updike Grain Company was forwarded to the Collector of Internal Revenue at Omaha, Nebraska for collection,

20 This defendant alleges, that the additional and amended return of the net income of the Updike Grain Company hereinbefore referred to, showing the net income for the purpose of determining the war income and excess profits for assessment purposes for the year 1917 required and due under the rules and regulations of the Department of Internal Revenue, if any such further return was required of the Updike Grain Company, was due from it not later than March 1918, and this defendant shows to the court that no suit or proceedings for the collection of any tax on account of war income or excess profits for the year 1917 was begun or brought or commenced against the said Updike Grain Company or any of its stockholders, or against this defendant, until after the expiration of five years after the date said return, if any, was due, and by reason of such delay, this action is barred by the Statute of Limitations in such case provided.

Second Defense.

For further defense, this defendant alleges that said audit and amended return referred to in paragraph 23 of the amended bill of complaint was made by a duly constituted and appointed representative of the Department of Internal Revenue of the Complainant herein, was made by Deputy Collector of Internal Revenue for the District of Nebraska, duly and legally appointed as such as this defendant is in-

formed and believes, and which he upon such information and belief states to be the fact; such audit and amended return upon being received by the Department of Internal Revenue at Washington was by the Commissioner of Internal Revenue, ratified, confirmed and approved, accepted, signed and treated by said Commissioner of Internal Revenue as an amended return for the Updike Grain Company for the year 1917 in all respects made as required by law, and this defendant alleges, that no suit or proceedings for the collection of any tax was begun against the said Updike Grain Company, or any of its stockholders, or against this defendant until after the expiration of more than five years after the date said amended return was made, received, accepted, ratified, confirmed, approved and acted upon by the Department of Internal Revenue at Washington, D. C., and by reason of such delay, this action is barred by the Statutes of Limitations in such made and provided.

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Third Defense.

For further defense this defendant alleges, that in January 1920, the Commissioner of Internal Revenue at Washington, D. C. on returns and amended returns then before him, and from examination made by him and evidence obtained by him in the manner provided by law, assessed against the Updike Grain Company the war income and excess profits taxes for the year 1917 based on the full net earnings of the Updike Grain Company for the year 1917, such an assessment being in addition to the amount of taxes theretofore paid by the Updike Grain Company in the sum of approximately $143,000.00; this defendant cannot state the exact amount which was then assessed by said Commissioner of Internal Revenue against the Updike Grain Company because of his inability to secure copies of said records as hereinbefore set forth, but he alleges said assessment was for the period, and for the war income and excess profits so made and received by the Updike Grain Company, and which form the basis for the claim set forth in the amended bill of complaint filed herein.

He alleges, that no suit for the recovery of the amount thereof was commenced against the Updike Grain Company or any of its stockholders, or against this defendant within six years from the date of said assessment, and by reason of such delay and lapse of time this action became, and is barred by the Statute of Limitations in such case made and provided. The claim against the Updike Grain Company, its stockholders and this defendant has been ex-

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guished and the prosecution of this action forbidden by of Congress.

Wherefore, having fully answered this defendant prays the gment of this court that the Complainant's amended bill complaint be dismissed, and that this defendant recover costs herein expended.

ED. P. SMITH,
By Smith, Schall,
Howell & Sheehan,
His Attorneys.

ndorsed: Filed Jun. 8, 1927, R. C. Hoyt, Clerk.

Separate Answer of George A. Roberts.

Comes now George A. Roberts, one of the defendants ein, and for separate answer to the amended bill of com- nt filed herein, states:

For the purpose of this answer, this defendant admits allegations of paragraphs 1 to 20 inclusive of the amend- ill of complaint, and also admits the allegation of para- h 25 thereof.

This defendant has neither knowledge nor information cient to enable him to form a belief as to the truth of the gations of fact contained in said amended bill of com- nt not hereinbefore expressly admitted to be true, and efore denies each and every allegation therein contained pt as heretofore admitted to be true.

This defendant further alleges that many of said alle- ons of fact in said amended bill of complaint not herein essly admitted to be true are based wholly upon the offi- records in the custody and control of the Commissioner nternal Revenue at Washington, D. C. or of the Collector nternal Revenue at Omaha, Nebraska, and that this de- ant cannot attach to this answer copies of said records proceedings hereinafter referred to, nor state the exact ents thereof and is forced to base his allegations rela- thereto upon information and belief.

First Defense.

For the first defense to the amended bill of complaint this defendant alleges that at all times during the year

1917 and during the corporate existence of the Updike Grain Company, Nelson B. Updike was its president, Elmer A. Cope was its treasurer and Gorton Roth was its secretary; that the Updike Grain Company was a corporation organized under the laws of the State of Nebraska, operating on a fiscal year basis, its fiscal year ending July 31st of each year; that immediately after the close of its fiscal year in 1917 said corporation duly filed in the manner provided by law and with the proper officials of the United States Government, its report of its net earnings for the fiscal year ending July 31, 1917, showing net earnings during said period of $2,371,997.05 and paid its tax then due thereon in the sum of approximately $143,000.00; that said Updike Grain Company discontinued business on the 31st day of July, 1917, and on or about the 18th day of August, 1917, said corporation was dissolved in the manner provided by the laws of the State of Nebraska, its assets in their entirety were transferred to the said Nelson B. Updike, who in consideration thereof, agreed to and did provide sufficient cash or its equivalent to pay to each stockholder in said corporation a sum equal to the par value of the stock so held by said stockholder in said corporation.

This defendant alleges that after the enactment by the Congress of the United States of the Revenue Act of 1917 referred to in paragraph 22 of the amended bill of complaint herein, and to-wit: on or about the 1st day of March, 1918 demand was made of the former President and Secretary of the Updike Grain Company that an additional and further return be filed in the name of the Updike Grain Company showing the entire net income of said Updike Grain Company for the year 1917. This defendant is advised and states the fact to be that because of the dissolution of said corporation as hereinbefore referred to, and for reasons which the said Nelson B. Updike and Gorton Roth deemed good
25 and sufficient, and acting in good faith and with no intent to deceive or evade the payment of any just or legal assessment of taxes then assessed, or that might after be assessed against the said Updike Grain Company, further or additional return of the net earnings of said Updike Grain Company for the year 1917 was not made.

This defendant is advised and alleges the fact to be that thereafter, to-wit: in October, 1918, duly constituted and legal representatives of the Internal Revenue Department of the Complainant herein whose names this defendant is unable to state, but who he alleges were duly authorized repre-

sentatives of said Internal Revenue Department and Deputy Collectors of Internal Revenue for the State of Nebraska duly constituted and appointed as such in the manner provided by law made investigation and audit of the net income of the Updike Grain Company for the year 1917; that after making said audit and investigation and reducing the same to writing, the same was forwarded to the Commissioner of Internal Revenue together with an amended return showing the net income of the Updike Grain Company for the year 1917 to be approximately $200,000.00 less than had heretofore been reported by the said Updike Grain Company.

This defendant is advised and alleges the fact to be that said audit, report and amended return as aforesaid so made by the said representatives of the said department were received by the Commissioner of Internal Revenue at Washington were in all respects by him ratified, confirmed and approved, were accepted and filed as an amended return of the income of the Updike Grain Company, were then signed, endorsed and approved as such amended return made by said Commissioner of Internal Revenue on information obtained by him as provided by law, and thereafter, to-wit: on or about the 15th day of January, 1920, said Commissioner of
16 Internal Revenue on the information then before him obtained in the manner provided by law, found and determined that there was due to the Complainant herein from the said Updike Grain Company an amount of war income and excess profits for the year 1917, a certain definite sum, the amount of which this defendant can not state because of his lack of information.

He alleges that after making said return and from the information thus obtained as provided by law, the said Commissioner of Internal Revenue in January, 1920, made and entered of record in his office at Washington, D. C. an assessment against the Updike Grain Company, as, and for war income and excess profits taxes for the year 1917 in a certain definite sum and amount, which amount this defendant is unable to state, but which amount this defendant alleges represented the balance then claimed to be due from the Updike Grain Company as found, determined and assessed by said Commissioner of Internal Revenue on account of war income and excess profits taxes due from the Updike Grain Company on account of net profits, war income and excess profits for the year 1917. He alleges that immediately thereafter a notice of said assessment and a certified copy thereof showing the amount so assessed against the Updike Grain Company

was forwarded to the Commissioner of Internal Revenue at Omaha, Nebraska, for collection.

This defendant alleges that the additional and amended return of the net income of the Updike Grain Company hereinbefore referred to showing the net income for the purpose of determining the war income and excess profits for assessment purposes for the year 1917 required and due under the rules and regulations of the Department of Internal Revenue if any such further return was required of the Updike Grain Company was due from it not later than March, 1918, and this
27 defendant shows to the Court that no suit or proceedings for the collection of any tax on account of war income or excess profits for the year 1917 was begun or brought or commenced against said Updike Grain Company, or any of its stockholders or against this defendant until after the expiration of five years after the date said return, if any, was due and by reason of such delay this action is barred by the Statute of Limitations, in such case provided.

Second Defense.

For further defense, this defendant alleges that said audit and amended return referred to in paragraph 23 of the amended bill of complaint was made by a duly constituted and appointed representative of the Department of Internal Revenue of the Complainant herein, was made by Deputy Collector of Internal Revenue for the District of Nebraska duly and legally appointed as such as this defendant is informed and believes, and which he upon such information and belief states to be the fact. Such audit and amended return upon being received by the Commissioner of Internal Revenue, ratified, confirmed and approved, accepted, signed and treated by said Commissioner of Internal Revenue as an amended return for the Updike Grain Company for the year 1917 in all respects made as required by law, and this defendant alleges that no suit or proceedings for the collection of any tax was begun against said Updike Grain Company or any of its stockholders or against this defendant until after the expiration of more than five years after the date said amended return was made, received, accepted, ratified, confirmed, approved and acted upon by the Department of Internal Revenue at Washington, D. C. and by reason of such delay this action is barred by the Statute of Limitations in such case made and provided.

Third Defense.

For further defense this defendant alleges that in January, 1920, the Commissioner of Internal Revenue at Washington, D. C. on returns and amended returns hen before him and from examination made by him and evidence obtained by him in the manner provided by law, assessed against the Updike Grain Company the war income nd excess profits taxes for the year 1917 based on the full et earnings of the Updike Grain Company for the year 917, such an assessment being in addition to the amount of axes heretofore paid by the Updike Grain Company in the um of approximately $143,000.00; this defendant can not ate the exact amount which was then assessed against the pdike Grain Company because of his inability to secure ich information, but he alleges said assessment was for the eriod and for the war income and excess profits so made and eceived by the Updike Grain Company and which formed e basis for the claim set forth in the amended bill of complaint filed herein.

He alleges, that no suit for the recovery of the amount ereof was commenced against the Updike Grain Company any of its stockholders or against this defendant within six ars from the date of said assessment and by reason of such lay and lapse of time this action began and is barred by e Statute of Limitations in such case made and provided. he claim against the Updike Grain Company, its stockholds and this defendant has been extinguished and prosecution this action forbidden by the Act of Congress.

Wherefore having fully answered, this defendant prays the dgment of this court that the Complainant's amended bill complaint be dismissed, and that this defendant recover s costs herein expended.

GEORGE A. ROBERTS, Defendant,
By Warren H. Howard, His Attorney.

Endorsed: Filed Jun. 13, 1927. R. C. Hoyt, Clerk.

(Answer of Nelson B. Updike, et al.)

Come now Nelson B. Updike, Metta E. Updike, N. B. dike, Jr., Hazel Updike Reasoner, Edward Updike, Rob- B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Up- e, L. Claude Hamilton, F. C. Bell, Pearl Miller, Jo Ham- n, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas.

Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, and for answer to the amended bill of complaint of the complainant filed herein, state:

1. Admit the allegations of paragraphs I to XVIII inclusive.

2. Answering paragraph XIX of said amended bill of complaint, defendants admit this is a suit in equity of a civil nature, but deny that it arises under a law of Congress. Defendants are without knowledge as to whether this suit is brought by the United States or by the authority of any duly authorized officers of the United States.

3. Answering paragraph XX of said amended bill of complaint, defendants admit that the Updike Grain Company was duly organized as a corporation, under the laws of
30 the State of Nebraska, in August, 1899, the exact date being August 21st, 1899; that in or about the year 1906, the capital stock was increased to $1,000,000.00, and in or about the year 1917 the capital stock was increased to $2,000,000.00; that the total paid up capital stock of said corporation, at the time of its dissolution, as hereinafter stated, and since April 30th, 1917, was $2,000,000.00; admit that said corporation had in its principal office and place of business at Omaha, Nebraska, and from August 21st, 1899, until on or about August 28th, 1917, which was the date of its formal dissolution, said corporation was engaged in the business of receiving grain on consignment, storing, buying, selling and dealing in grain. Further answering said paragraph, defendants allege that the Updike Grain Company was duly organized with a total paid up capital stock of $110,000.00, which on July 1st, 1901, was duly increased to $500,000.00, and on December 9th, 1905, was duly increased to $1,000,000.00, and on April 30th, 1917, was duly increased to $2,000,000.00.

4. Admit the allegations of paragraph XXI of said amended bill of complaint.

5. Answering paragraph XXII of said amended bill of complaint, defendants admit that on October 3rd, 1917, the Congress of the United States enacted a Revenue Law entitled as therein described, which repealed Title II of the Revenue Act of March 3d, 1917, providing for a war excess profits tax, and providing further that any amount paid under Title II of the Act of March 3d, 1917, should be cred-

ited on any amount due as war excess profits tax under said Act of October 3d, 1917, but deny that by virtue of the provisions of said Revenue Act, said Updike Grain Company was required to make and file with the Commissioner of Internal Revenue, for the District of Nebraska, returns for its income, war income tax, and excess profits tax for the
31 taxable period ended June 30th, 1917, and to pay the income, war income and excess profits taxes, herein claimed to have been imposed upon said Updike Grain Company, by said Revenue Act of October 3d, 1917; deny that said Updike Grain Company failed, neglected or refused to file returns for its income, war income, or excess profits taxes for the year 1917, or any part thereof, or to pay the income, war income or excess profits taxes legally due from said Updike Grain Company for the year 1917.

6. Answering paragraph XXIII of said amended bill of Complaint, admit that said Updike Grain Company conducted its business on a fiscal year basis; admit that the Commissioner of Internal Revenue directed that a review and audit be made by the Revenue Department, of the books, records and accounts of said Updike Grain Company, to determine any tax liability under the Revenue Act of October 3d, 1917, for the fiscal year ended June 30, 1917, and that said review and audit of the books, records and accounts of said Updike Grain Company were made during the month of October, 1918, and that thereafter the Revenue Department computed, determined and found that there was due from said Updike Grain Company to the complainant, on account of an alleged income, war income and excess profits tax liability of said Updike Grain Company, for said fiscal year ended June 30th, 1917, the sum of Three Hundred Seventy-Three Thousand, Nine Hundred Eleven and Fifty-Four One-Hundredths ($373,911.54) Dollars; admit that the fiscal year commenced August 1st, 1916, but deny that same ended on July 31st, 1917, and in that behalf allege that the fiscal year of said Updike Grain Company ended on June 30th, 1917; deny that the Updike Grain Company discontinued business June 30th, 1917, and in that behalf allege that the said Updike Grain Company continued in
32 business after the ending of its fiscal year on June 30th, 1917, until the date of its dissolution, on or about August 28th, 1917; deny that said Updike Grain Company failed to make its income, war income, or excess profits tax returns, or either or any of them, of its net income and earnings for the year 1917, or for the fiscal year ended June 30th, 1917. Further answering said paragraph XXIII, and other

allegations in the said amended bill of complaint, relating thereto, these defendants allege that the facts respecting the returns filed by said Updike Grain Company and the reviews and audits made by the Department or Bureau of Internal Revenue, and any returns that might have been made by any collector or deputy collector of Internal Revenue, or the Commissioner of Internal Revenue, are matters of official record in the custody and control of the Commissioner of Internal Revenue at Washington, D. C.; that some of these defendants personally, and all of these defendants by and through their attorney, have requested upon a number of occasions, both in writing and orally, of the Commissioner of Internal Revenue, the general counsel of the Bureau of Internal Revenue, by and through the assistant general counsel of the Bureau of Internal Revenue, and other attorneys for the Bureau of Internal Revenue, and of the United States District Attorney having charge of this case, copies of such of said records as are in their possession, and an opportunity to examine the originals of said documents, and have offered to pay the charges and cost of any copies of said documents, which requests have been refused and denied by each and all of said parties, until June 15, 1927, when the United States District Attorney for Nebraska, exhibited to one of the attorneys for defendants, what purported to be photostat copies of an income tax return of said Updike Grain Company dated July 24th, 1917, filed July 25th, 1917, an excess profits tax return of said company dated August 29th, 1917, filed August
33 30th, 1917, an amended excess profits tax return of said company dated September 27th, 1917, filed September 28th, 1917, return form 1031, attached to which is a certificate dated March 26th, 1918, income tax return dated January 25th, 1918, filed January 29th, 1918, copy of a letter dated October 26th, 1918, to Commissioner of Internal Revenue from John J. Gillin, Revenue Agent in charge at Omaha, Nebraska, transmitting report of L. C. Smith, of date October 25th, 1918, with exhibits and forms 1031 and 1103 attached thereto (minus forms 7894 mentioned therein); also, letter of date June 30th, 1919, to said Commissioner from said Revenue Agent in charge, transmitting transmittal report of L. C. Smith, of date June 30th, 1919; that as a result of said refusals, these defendants cannot adequately answer the amended bill of complaint, filed herein, nor exactly state the facts respecting said matters, but defendants are informed and believe, and therefore state the facts to be, that in the month of July, 1917, said Updike Grain Company duly executed, made and filed with com-

plainant and the collector of Internal Revenue at Omaha, Nebraska, its return of its net income, and earnings for the eleven-month period ending June 30th, 1917, being its fiscal year as determined and accepted by the collector of Internal Revenue at Omaha, Nebraska, and at the same time paid the full amount of income taxes then due thereon; that on August 29th, 1917, said Updike Grain Company duly executed, made and filed with complainant and the collector of Internal Revenue at Omaha, Nebraska, its return of net income and earnings for the eleven-month period ending June 30th, 1917, and at the same time paid the full amount of excess profits tax then due thereon; that thereafter, and on or about September 27th, 1917, said Updike Grain Company duly executed, made and filed with complainant and
34 the collector of Internal Revenue at Omaha, Nebraska, an amended excess profits tax return for the eleven-month period ending June 30th, 1917, and at the same time paid the tax then due thereon; that on or about August 28th, 1917, the said Updike Grain Company was duly and legally dissolved as a corporation, pursuant to the laws of the State of Nebraska, and at the same time distributed its entire assets among its stockholders, in proportion to their stock interests in said corporation, as same existed at the time of said dissolution; that on or about January 25th, 1918, said Updike Grain Company duly made and filed with the complainant and the collector of Internal Revenue at Omaha, Nebraska, its return of its net income and earnings for the period July 1st, 1917, to the date of its dissolution on or about August 28th, 1917, showing no net earnings for said period and accompanying said return with a certificate of dissolution, showing dissolution of the taxpayer on or about August 28th, 1917; that the returns filed by said Updike Grain Company, as aforesaid, accurately set forth specifically the gross amount of income from all separate sources of said Updike Grain Company for the year 1917 and for the eleven-month period ending June 30th, 1917, and the aggregate items of allowances authorized by law, and the total and entire net income and earnings of said Updike Grain Company for the eleven-month period ending June 30th, 1917, for the periods January 1st, 1917, to June 30th, 1917, and July 1st, 1917, to the date of dissolution of said Updike Grain Company on or about August 28th, 1917, and all other facts, data and information appropriate and necessary to determine the correctness of the net income returned and to carry out any applicable provisions of the Revenue Act of October 3d, 1917, and to assess any taxes that might have accrued against said Updike Grain Com-

pany under said Revenue Act of October 3d, 1917; that thereafter and in October, 1918, one L. C. Smith and other duly authorized representatives of the Bureau of In-
35 ternal Revenue, the Secretary of the Treasury of the United States, said Commissioner of Internal Revenue, and the Collector of Internal Revenue at Omaha, Nebraska, but whose names these defendants are unable to state, because of the refusals of the Commissioner of Internal Revenue and other officers, having charge and control of the official records relating to said matters, to give to these defendants copies or an inspection of said records, except as hereinbefore described, made an investigation, review and audit of the returns aforesaid and of the net income and earnings of said Updike Grain Company, for the year 1917; that after making said investigation, review and audit of the books, records, income and earnings of said Updike Grain Company for the year 1917, and of the returns made by said Updike Grain Company as aforesaid, said L. C. Smith and the other representatives, as aforesaid, on October 25th, 1918, duly made, subscribed and forwarded to the Commissioner of Internal Revenue at Washington, D. C., a report of said investigation, review and audit, and an amended return showing and setting forth specifically the gross amount of income from all separate sources of said Updike Grain Company for the year 1917, and the aggregate items of allowances authorized by law, and the net income and earnings of said Updike Grain Company for the year 1917; that said investigation, audit and report and amended return so made and forwarded, as aforesaid, with the returns of said Updike Grain Company, as aforesaid, were in all respects ratified, confirmed, accepted, approved and filed by said Commissioner of Internal Revenue as the returns and amended return of said Updike Grain Company, of its income and earnings for the eleven-month period ending June 30th, 1917, and for the year 1917; that said investigation, review, audit, report and amended return were at said time signed, subscribed, endorsed, accepted, adopted, filed and approved as the returns and amended return of
36 said Updike Grain Company for the year 1917 and for the eleven-month period ended June 30th, 1917, by the Commissioner of Internal Revenue and by a collector or deputy collector of Internal Revenue; that thereupon and in or about the month of October, 1918, said Commissioner of Internal Revenue computed, determined and found from said returns made and filed by said Updike Grain Company, and said investigation, review, audit, report and amended return, that there was due from said Up-

dike Grain Company to complainant, on account of the income, war income and excess profits tax liability of said Updike Grain Company, for the year 1917, and for the eleven-month period ended June 30th, 1917, the additional sum of Three Hundred Seventy-Three Thousand, Nine Hundred Eleven and Fifty-Four One-Hundredths ($373,911.54) Dollars, the amount sought to be recovered in this action, and thereupon assessed a tax against said Updike Grain Company in said amount; that thereafter said assessment of additional tax, in the amount of Three Hundred Seventy-Three Thousand, Nine Hundred Eleven and Fifty-Four One-Hundredths ($373,911.54) Dollars, was [formerly] endorsed upon the return duly executed and made by said Updike Grain Company, July 24th, 1917, and duly filed with the complainant and the collector of Internal Revenue at Omaha, Nebraska, on July 25th, 1917, by said Commissioner of Internal Revenue; that thereafter in January, 1920, said Commissioner of Internal Revenue formally and in the manner required by law, entered upon the assessment roll of said Commissioner of Internal Revenue and the Bureau of Internal Revenue, said assessment; that thereupon and in January, 1920, said Commissioner of Internal Revenue certified said assessment to the collector of Internal Revenue at Omaha, Nebraska, in the manner required by law, and said collector thereupon made demand upon said Updike Grain Company and the officers thereof, for the payment of said ad-
37 ditional tax, as thus determined and assessed, and ever since said date has upon numerous occasions been continuously asserting the validity of said assessment, pursuant to directions of the complainant and said Commissioner of Internal Revenue.

7. Answering paragraph XXIV of said amended bill of complaint, defendants admit that said taxes were computed and determined by the Commissioner of Internal Revenue as set forth in said paragraph, but in that behalf these defendants allege that said computation is erroneous in this, that in the determination of said tax, only eleven-twelfths of the invested capital and specific exemption, allowed said Updike Grain Company under the laws then existing, was used as a basis for computing said tax, whereas the full invested capital and the full specific exemption should have been used; that there was an additional error in the computation of said tax, in this, that in computing the 4% additional tax under the Revenue Act of October 3d, 1917, the excess profits tax of said Updike Grain Company was deducted from the net earnings of said corporation, for the

entire fiscal year period, August 1st, 1916, to June 30th, 1917, whereas said excess profits tax should have been deducted from the net earnings for the period January 1st, 1917, to June 30th, 1917. That the full invested capital of the Updike Grain Company for the period covered in said computation as determined by said review and audit, was $1,018,626.45; that the net income and earnings of said Updike Grain Company for the period August 1st, 1916, to June 30, 1917, exclusive of dividends received, as so determined, were $1,584,188.38, and the net income and earnings of said corporation for the period January 1st, 1917, to June 30th, 1917, exclusive of dividends received, as so determined, were $410,419.64. That as a result of said erroneous computation,
38 the amount of tax claimed in said amended bill of complaint is overstated, and in excess of any sum that might be due, under any laws existing at the time thereof, based upon the aforesaid figures, in the sum and amount of $13,421.25. That in the event it shall be held that said Updike Grain Company was liable for any additional taxes for the year 1917, defendants are informed and believe, and therefore state the facts to be, that said computation is further erroneous in this, that owing to abnormal conditions affecting the capital and income of said Updike Grain Company, the tax computed, determined, found and assessed thereon by said Revenue Department and Commissioner of Internal Revenue, worked and continues to work upon said corporation an exceptional hardship evidenced by gross disproportion between the tax, as thus computed, and taxes computed against other representative corporations, for the same period, whose invested capital can be satisfactorily determined, and which corporations were, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted, and capital employed, the amount and rate of war profits or excess profits, and all other or relevant facts and circumstances. That this is not a case in which the tax is high, merely because the corporation earned within the taxable year a high rate of profits, upon a nominal invested capital, nor in which fifty per centum or more of the gross income of the corporation, for the taxable year, computed as required by law, consisted of gains, profits, commissions or other income derived on a cost-plus basis, from a Government contract or contracts made between April 6, 1917, and November 11, 1917, both dates inclusive. In the event it shall be determined that there was a tax due and owing from said Updike Grain Company, under the Revenue Act of October 3d, 1917,

then these defendants are entitled to a special assessment of said tax under the provisions of Section 210 of the
39 Revenue Act of October 3d, 1917, Sections 327 and 328 of the Revenue Act of 1918, and such rules and regulations of the Bureau of Internal Revenue and the Commissioner of Internal Revenue, as were and are applicable thereto.

8. Answering paragraph XXV of said amended bill of complaint, defendants admit the allegations therein set forth.

9. Answering paragraph XXVI of said amended bill of complaint, defendants admit all of the allegations in said paragraph, except that there were any taxes due and owing to the United States, as set out in said amended bill of complaint, and that these defendants, as stockholders of said corporation, received the money, assets and property of said Updike Grain Company, as distributees charged with a trust in favor of the United States to the extent of taxes claimed by the complainant, or any other taxes, which allegations these defendants deny.

10. Answering paragraph XXVIII of said amended bill of complaint, defendants state that they are without knowledge as to the allegations therein contained.

11. Defendants deny each and every allegation in said amended bill of complaint contained, not in this answer specifically admitted to be true.

12. That neither the said Updike Grain Company, nor any of the defendants herein, were at any time guilty of fraud, with or without intention to evade said taxes, or of any wilful or other attempt to defeat or evade said taxes, or any taxes legally due the complainant herein. That the returns filed by said Updike Grain Company, as aforesaid, were not false or fraudulent, were not made or rendered with the intent to evade any legal tax due, or to become due, from said Updike Grain Company, or the taxes claimed in the amended bill of complaint of the complainant filed herein.

13. That there are not now, and never were, any taxes due or owing to the complainant herein, from said Up-
40 dike Grain Company, or any of these defendants, under the provisions of the Revenue Act of October 3d, 1917, for the reason that provisions of said Revenue Act of October 3d, 1917, are not by their terms made applicable to corporations which were not in existence at the time of the

passage of said Act, nor to stockholders of such corporations, dissolved prior to the passage of said Act; that while the said Act provides for the payment of taxes by taxpayers upon whom the said Act operates on account of income and profits received prior to the passage of the Act, yet no portion of said Act expressly, or otherwise, authorizes the levying of taxes upon corporations which had ceased to exist at the time of and prior to the passage of said Act, nor upon any representatives or stockholders of such corporation. Defendants allege that if said Revenue Act of October 3d, 1917, be so construed as to become applicable to corporations organized under the laws of the State of Nebraska, whose corporate existence had been terminated in accordance with such laws, prior to the passage of the said Act, or if the said Act be so construed as to make unlawful or to invalidate the lawful distribution of the assets of said corporation, made to its stockholders prior to the passage of said Act, and while such distribution was lawful and permitted under existing Laws, then the said Revenue Act of October 3d, 1917, insofar as it may be so construed or applied, is contrary to the provisions of the Fifth Amendment to the Constitution of the United States, in that it deprives these defendants of their property without due process of law, and denies to them the equal protection of the laws, and will result in taking their property for public use without just compensation.

14. This suit is the only suit or proceeding ever begun by the complainant herein, or any person or official representing the complainant herein, for the collection of said taxes.

15. At the time of the commencement of this suit,
41 more than five years had expired from the time such taxes were due, and from the time a return of the income for the taxable year 1917, or for that portion of the fiscal year of said Updike Grain Company in the calendar year 1917, was due from said Updike Grain Company; and the right to collect said taxes from said Updike Grain Company, and these defendants or any of them, was then and is now barred by the statutes of limitations of the United States, in such cases made and provided.

16. At the time of the commencement of this suit, more than six years had expired from the date the assessment of said taxes was made, and the right to collect said taxes from said Updike Grain Company, and these defendants or any of them, was at the time of the commencement of this suit and the filing of the bill of complaint herein, and is now barred by

the statutes of limitations of the United States, in such cases made and provided.

17. That at the time of the commencement of this suit, more than five years had expired from the dates the returns were made by said Updike Grain Company, of its total and entire net earnings and income for the year 1917, and for the fiscal period ending June 30th, 1917, and from the date the amended return, hereinbefore described, was made, received, accepted, ratified, confirmed, approved and acted upon by the Bureau of Internal Revenue at Washington, D. C., and the Commissioner of Internal Revenue, and from the time the returns made by said Updike Grain Company, as aforesaid, were received, accepted, approved, and adopted as the returns of said Updike Grain Company for the computation, determination and assessment of the taxes claimed herein, and the right to collect said taxes from said Updike Grain Company and these defendants, or any of them, was, at the time of the commencement of this suit, and is now, barred by the statutes of limitations of the United States, in such cases made and provided.

18. Further answering said amended bill of com-
42 plaint these defendants allege that ever since the passage of said Revenue Act of October 3d, 1917, there has been a substantial controversy between the complainant herein and these defendants, over the right of complainant to assess any taxes against said Updike Grain Company, under the provisions of said Revenue Act; and to collect any of such taxes from any of these defendants; that said contention has been made by these defendants in good faith; that upon the dissolution and liquidation of said corporation, each and all of the defendants herein received only the amount that they had invested in the stock of said corporation, and in making returns of their individual incomes and net earnings for the year 1917, in good faith assumed that they were receiving for said stock the full par value thereof, and consequently did not deduct from their individual net incomes or earnings, any loss upon said stock, which they will have suffered as of the year 1917, in the event it shall be held in this action that the complainant is entitled to recover herein. In the event, therefore, that the complainant should recover herein, said defendants will have thereby overstated their respective net earnings and incomes for said year, but in what amounts these defendants are now, and at all times herein stated have been, unable to state or determine, and will not be able to state or determine until the final decision of this case.

Wherefore, defendants pray as follows:

1. That the amended bill of complaint of the complainant herein be dismissed and that the defendants recover their costs herein expended.

2. That in the event it shall be determined that there are any amounts owing by any of the defendants herein to the complainant, on account of the taxes set forth in the amended bill of complaint, a redetermination be made of the net income and earnings of each of the defendants herein, and deductions be allowed from said earnings, in the
43 amount of any judgments that may be entered against said defendants, and that the taxes assessed against these defendants upon their individual net incomes and earnings for said year 1917, be re-computed after making and allowing such deductions, and any refund thereby found due said defendants be offset against any judgment that may be entered herein.

3. That in the event it shall be determined that said Updike Grain Company was liable for any additional tax for the year 1917, it be adjudged that said Updike Grain Company was, and is, entitled to a special assessment thereof, pursuant to the provisions of Section 210 of the Revenue Act of October 3d, 1917, Sections 327 and 328 of the Revenue Act of 1918, and such rules and regulations of the Bureau of Internal Revenue and the Commissioner of Internal Revenue, as were and are applicable thereto.

4. That defendants have such other and further relief as to the court may seem just and equitable.

FRANCIS A. BROGAN,
A. G. ELLICK,
ANAN RAYMOND,
Solicitors for Answering Defendants.

Endorsed: Filed Jun. 20, 1927. R. C. Hoyt, Clerk.

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44 (Order granting Defendants, Nelson B. Updike, et al., leave to file interrogatories.)

Now on this 9th day of July, 1927, this cause came on for hearing upon the application of Nelson B. Updike, Metts E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell,

R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, defendants in the above entitled cause, for an order allowing them to file herein, the interrogatories submitted with said application, to be answered by such officers of complainant as are designated in a note at the foot thereof, and it appearing to the court that complainant is a public corporation and that said interrogatories are for the discovery of facts and discovery of documents material to the defense of this cause.

It is, therefore, ordered that said defendants be, and hereby are, allowed to file said interrogatories herein, forthwith and that D. H. Blair, Commissioner of Internal Revenue, T. F. Langley, Chief of Proving Section Income Tax Unit, Bureau of Internal Revenue, James J. Drakeford,
45 Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, shall separately and fully answer such of said interrogatories, and furnish such of the documents therein requested, as are designated in the note at the foot of said interrogatories, and that said answers shall be in writing, under oath, signed by the officer interrogated, and filed herein within fifteen (15) days after service of same upon the solicitors for complainant.

By the Court:

THOS. C. MUNGER, Judge.

Endorsed: Filed July 9, 1927. R. C. Hoyt, Clerk.

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46 (Application of Defendants Nelson B. Updike, et al., to file additional interrogatories.)

Comes now Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, defendants in the above entitled cause and hereby

apply to the above court or any judge thereof for an order allowing them to file the additional written interrogatories submitted herewith to be answered by D. H. Blair, Commissioner of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, officers of the complainant, a public corporation, as designated in the note at the foot of said additional interrogatories.

FRANCIS A. BROGAN
A. G. ELLICK
ANAN RAYMOND
Solicitors for above named defendants.

Endorsed: Filed Dec. 21, 1927. R. C. Hoyt, Clerk.

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47 (Affidavit of A. G. Ellick.)

United States of America,
State of Nebraska,
Omaha Division—ss:

A. G. Ellick, being first duly sworn on his oath, states that he is one of the solicitors for a number of the defendants in the above entitled cause, for whom answer has been filed herein on June 20th, 1927, and particularly for the defendants Nelson B. Updike and Gorton Roth; that the Updike Grain Company referred to in the petition of the complainant, filed herein, was a corporation organized and existing under the laws of the State of Nebraska, and was duly dissolved on or about August 28th, 1917, whereupon it discontinued business and immediately distributed its entire assets among its stockholders; that in August, 1926, a representative of the Commissioner or Bureau of Internal Revenue of the United States made an examination of the books and records of said Updike Grain Company, which were freely furnished to him by the said Nelson B. Updike and Gorton Roth, with the declared purpose of ascertaining data to proceed against the stockholders of said company, pursuant to the provisions of Section 280 of the Revenue Act of 1926, as transferees of the assets thereof, for the collection of an alleged tax declared to have been assessed against the Updike Grain Company in January, 1920, upon its income and net earnings for the year 1917, under the
48 Revenue Act of October 3d, 1917, being the same tax asserted in the amended bill of complaint filed herein; that in November, 1926, said Nelson B. Updike and affiant, as attorney for said Nelson B. Updike and Gorton

Roth, two of the stockholders of said Updike Grain Company, went to Washington to secure a conference with the officials of the Bureau of Internal Revenue, respecting the liability of said Nelson B. Updike and Gorton Roth, and other stockholders of said company, for said tax or any part thereof, and on November 5th, 1926, conferred with one C. G. Hoffman and one H. T. Lore, Acting Chief and representatives, respectively, of the Division or Section of the Bureau of Internal Revenue having said matter in charge; that in the course of said conference the said Hoffman and Lore were advised by affiant and the said Updike, that they understood the tax, for the collection of which the Bureau of Internal Revenue was threatening to proceed against said stockholders, had been assessed against said Updike Grain Company more than six (6) years before the enactment of the Revenue Act of 1926, and asserted that no proceedings of any kind had been begun against said Updike Grain Company, or any other person, for the collection of said tax, up to the time of said conference; that thereupon the said Hoffman and Lore examined the file containing the records and data respecting said tax, then in their possession, and orally advised affiant and the said Updike that said tax had been assessed against said Updike Grain Company in January, 1920, and that in their opinion the right to collect said tax against said Updike, or any other stockholder of said Updike Grain Company, was barred, but that they would not wish to give a final opinion in said matter, without conferring with the Department or Office of the General Counsel for the Bureau of Internal Revenue; that after further conference with Hoffman and Lore, and certain attorneys
49 or counsel for the Bureau of Internal Revenue, the entire file respecting said tax was directed to be delivered to the office of General Counsel for the Bureau of Internal Revenue, for examination, in connection with a conference to be thereafter held, respecting the following questions:

1. Was the right to collect said tax from the Updike Grain Company then barred by the Statutes of Limitations of the United States?

2. If the right to collect the tax from said Updike Grain Company was then barred, as aforesaid, would that fact bar the right of the United States to proceed against the said Nelson B. Updike and Gorton Roth, and other stockholders of said company, for the collection of said tax?

That thereupon and on or about November 9th, 1926, all of the papers relating to said tax were transmitted by the

said Hoffman and Lore to the office of the General Counsel for the Bureau of Internal Revenue, where same were delivered and referred to L. S. Canon, H. C. Armstrong, and O. P. Vogel, attorneys for the Bureau of Internal Revenue, for a determination of the questions hereinbefore set forth. That in the course of a conference between said attorneys and affiant, and the said Nelson B. Updike, it was asserted by affiant that certain returns had been made by said Updike Grain Company of its total net earnings and income for the year 1917, which had been received, accepted, adopted and approved by the Bureau of Internal Revenue, and the Commissioner of Internal Revenue, as the returns of the said Updike Grain Company for the year 1917, and for the fiscal period ending June 30th, 1917; and that certain amended return or returns had been made by officers and rep-
50 resentatives of said Bureau of Internal Revenue and said Commissioner of Internal Revenue, of the total net income and earnings for the year 1917 and for the fiscal period ending June 30th, 1917, which had been received, accepted, adopted and approved by the Bureau of Internal Revenue and the Commissioner of Internal Revenue, as the returns of said Updike Grain Company under the Revenue Act of October 3d, 1917; and that by reason of said facts, the right to collect said tax was then barred by the Statutes of Limitations of the United States and had been barred ever since five (5) years after said returns had been made; also that an assessment of said tax had been made against said Updike Grain Company in January, 1920, which assessment was based upon the returns, aforesaid, and which was duly endorsed upon one of said returns and duly entered upon the regular assessment roll kept for that purpose, respecting all assessments of taxes of that character, and duly certified to the Collector of Internal Revenue at Omaha, Nebraska, and that by reason of all of the facts aforesaid the right to collect said tax against the stockholders of said Updike Grain Company was then barred by the Statutes of Limitations of the United States; that in order to intelligently discuss the legal questions involved and to determine the liability of said stockholders, and whether or not said taxes were barred as aforesaid, it was necessary to verify the facts so [started] by affiant, or in any event to ascertain the exact facts disclosed by said files and records. That thereupon affiant and the said Updike asked to be permitted to view the files and records respecting the above matters, and then in possession of the attorneys for the Bureau of Internal Revenue, present at said conference; that

although a claim was being asserted by said attorneys
51 against said Updike and other stockholders, for said tax, that was based upon the record then in their possession, said attorneys refused to permit either affiant or said Updike to view the records and documents aforesaid, for the purpose of ascertaining the facts determinative of said liability, and refused to state to, or advise, affiant or the said Updike what said records and documents disclosed in that respect, asserting as a reason for said refusal that inasmuch as said Updike Grain Company had been dissolved the said Updike was no longer a stockholder of said corporation, and that permission to view said records and documents, or to ascertain the facts respecting same, could not be disclosed without authority from the Commissioner of Internal Revenue, and suggesting that in order to expedite decision of the question, as to the right of said Updike and affiant to view said records and documents, or to ascertain the facts respecting the contents of same, a communication be immediately directed to the Commissioner of Internal Revenue, for a ruling upon the right to view same; that as a result of said refusal to disclose the facts contained in said record and documents, affiant and the said Updike were compelled to discuss the merits of said claim, without ascertaining the record evidence and facts, upon which said claim was based, but were assured further conference, when authority to examine said documents was procured from the Commissioner of Internal Revenue; that in order to expedite the determination of said liability, affiant on the morning of November 12th, 1926, personally delivered to the office of the Commissioner of Internal Revenue, Treasury Building, Washington, D. C., a written communication addressed to him and signed by said Nelson B. Updike, requesting a ruling upon the
52 right or privilege of the said Updike, or affiant, to view the above records or documents, or to secure copies of same, which communication was as follows:

"The Updike Grain Company of Omaha, Nebraska, was dissolved in August 1917, and its assets distributed to its stockholders, the undersigned, Nelson B. Updike, being one of the principal stockholders. In January 1920, a tax was assessed against the Updike Grain Company under the Act of October 3, 1917. This tax has not been paid. The Income Tax has indicated an intention to assert a liability for this tax against me under Section 280 of the Revenue Act of 1926.

"I am in Washington at the present time conferring with representatives of the Income Tax Unit and attorneys asso-

ciated with the office of the solicitor of Internal Revenue, with respect to this liability.

"In a conference late yesterday afternoon with H. C. Armstrong, O. P. Vogel and L. S. Cannon, attorneys representing the Internal Revenue Department, I asked to see certain documents relating to this tax. This request was denied because the attorneys feared that they were not permitted to exhibit or give copies of these documents to me because of the fact that the Updike Grain Company had been dissolved and I, being no longer a stockholder, was not entitled to this information although same is necessary for me to have in order to determine whether or not a liability exists against me for this tax.

"At their suggestion, I am asking for a ruling from your Department respecting my right to examine and to have copies of the following documents:

53 1. The return of the Updike Grain Company for the fiscal year ending June 30, 1917.

2. The return of the Updike Grain Company for the period extending from July 1, 1917, to the date of dissolution in August 1917.

3. The return upon which the tax was assessed under the revenue act of October 3, 1917, being the assessment made in January 1920.

4. The report of the Government auditor or collector, or deputy collector of Internal Revenue forwarded to your department in connection with the return upon which the tax was based.

5. The letter of transmittal to your department accompanying the return or report upon which the tax was based.

"Further conference respecting my liability is being deferred until I ascertain if I can have the above information, and I am remaining in Washington awaiting your ruling. I will, therefore, appreciate it if you can expedite your ruling in this matter as much as possible. In the event you determine that I am entitled to have this information, will you kindly instruct Mr. Armstrong to furnish same to us?

"My address is—Hotel Hamilton, Room 700."

That on November 13th, 1926, said Updike received the following acknowledgment of receipt of said communication

dated November 12th, 1926, and signed C. R. Nash, Assistant to the Commissioner, by C. G. Hoffman:

"Receipt is acknowledged of your letter dated November 12, 1926, in which you request a ruling as to whether you are entitled to examine and receive copies of certain returns and related papers regarding the income tax liability of the
54 Updike Grain Company, (dissolved) Omaha, Nebraska, for the eleven-month period ended June 30, 1917 and the period July 1 to August 28, 1917.

"You are advised that your request will be given careful consideration and an endeavor will be made to advise you fully with regard to the matter, at the earliest practicable date."

That thereafter affiant and the said Updike made numerous efforts to secure a ruling upon the communication to the Commissioner of Internal Revenue, dated November 12th, 1926, and to secure a further conference with the attorneys for the Bureau of Internal Revenue, after ascertaining the facts and data requested in said communication, and remained in Washington, D. C., until November 20th, 1926, for that purpose, and for a ruling upon the liability of the said Updike, and other stockholders, for said tax, but without avail; that on account of important engagements of said Updike and affidavit, at Omaha, Nebraska, and the expense of remaining in Washington, and the inability to secure any definite statement from anybody connected with the office of the General Counsel for the Bureau of Internal Revenue, or to the Bureau of Internal Revenue, respecting the time when a reply would be forthcoming to the communication to the Commissioner of Internal Revenue, dated November 12th, 1926, or as to the liability of the said Updike and other stockholders for said tax, affiant and said Updike were required to return to Omaha, without having an opportunity to view said records and documents, or to ascertain the facts respecting same, and without a conference, when possessed of said facts, and on November 20th, 1926, affiant addressed and forwarded to Alexander W. Gregg, General Counsel
55 for the Bureau of Internal Revenue, the following communication, wherein the facts are correctly stated:

"We were very much disappointed to learn this morning as result of a personal visit to your office, that no opinion would be rendered in above matters by your Department this week, and that you were out of the city to be gone until the latter part of next week.

"Inasmuch as we have been advised by members of your Department to whom consideration of the above matters were referred by you, that a final opinion would not be rendered until submitted to you for your personal approval, it does not seem likely that we will have your decision until another week has expired.

"As you know, we have remained here for the purpose of expediting a settlement of the controversal matters respecting the above taxes and the liability of the transferees therefor so as to relieve Mr. Updike of the embarrassment which the uncertainty of his liabilities in this matter has caused him since the tax was assessed against the Updike Grain Company in January, 1920. Mr. Updike is a man of large and varied affairs and his stay here has been at considerable financial sacrifice.

"So that you may have before you the chronology of our contact with the Internal Revenue Department since our arrival in Washington on November 4, 1926, I am setting forth same:

Nov. 5, 1926. Conferred with Messrs. Hoffman and Lore of the Rules and Regulations Department respecting the withholding of sending out sixty day notices to transferees until facts and law respecting the liability of transferees
56 could be ascertained and determined, at which informal conference the matter was deferred until Tuesday, Nov. 9th for opportunity of Mr. Lore to confer with your Department respecting liability of transferees for tax.

Nov. 9, 1926. Advised by Mr. Lore that the matter could not be determined until a joint conference was had with Mr. Mitchell of your Department and with Mr. Lore of the Rules and Regulations Department.

Nov. 9, 1926. Held joint conference with Messrs. Mitchell and Lore, which was not completed because Mr. Mitchell was required to leave the city until Nov. 13th.

Nov. 9, 1926. With the consent of Mr. Mitchell, conferred with you in presence of Mr. Lore respecting above liability, at which conference it was stated that in event papers were promptly sent over by the Rules and Regulations Department, an opinion would be forthcoming in all probability by the end of that week.

Nov. 11, 1926. Advised by Mr. Armstrong of your Department, that papers had been received and that he was pre-

pared for a conference. Owing to the absence of Mr. Updike from the city, conference was set for four o'clock P. M. the same date.

Nov. 11, 1926—4 P. M. Conferred with Messrs. Armstrong, Cannon and Vogel at which conference we desired to view the documents upon which the taxes against the Updike Grain Company were based so as to possess ourself of the facts, necessary for us to know, to determine the liability. A view of these documents was refused on the ground that Mr. Updike was no longer a stockholder of the corporation, and suggestion made that we address a communication to the Commissioner of Internal Revenue for a ruling of our right to view the above data.

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Nov. 12, 1926. Addressed written communication to the Commissioner of Internal Revenue requesting a ruling upon our right to view the above data or to secure copies of same, and in the event of a ruling granting that right, that Mr. Armstrong be advised accordingly.

Nov. 2, 1926. Written advice from C. R. Nash, Assistant to the Commissioner, that our request would be given careful consideration and that we would be advised at the earliest practicable date.

Nov. 13, 1926. Delivered memorandum brief covering law respecting the facts available as to liability of transferees, with advices that brief could not be furnished upon certain branches of the controversy until the data theretofore requested had been furnished.

58

Nov. 15, 1926. Advised by Mr. Armstrong that brief had been delivered to him and that opinion would come forth promptly, but that he had received no instructions respecting our right to view the data referred to above.

Nov. 16, 1926. Delivered written communication to you advising that no opinion had come to us from your Department, and asking that the matter be expedited as much as possible on account of business demands upon Mr. Updike.

Nov. 18, 1926. Advised by Mr. Armstrong that he had received no instructions respecting our right to view above data; that opinion was not yet available respecting the questions presented in our memorandum brief, but that opinion would be forthcoming from your Department on or before Nov. 20th.

Nov. 19, 1926. Telephoned your office to arrange a conference in order to expedite ruling upon our right to view data referred to above, and opinion upon liability of transferees.

Nov. 20, 1926. Advised by your office that the matter
59 was now in the hands of Mr. Cannon; that you were out of the city to be gone until the latter part of next week.

Nov. 20, 1926. Advised by Mr. Cannon's office that opinion from him would not go forward to your office until Nov. 22nd or 23rd.

"Important business engagements of both Mr. Updike and myself at Omaha which have been postponed from time to time as result of our stay here, can no longer be deferred, and we are compelled to leave for Omaha today.

"Because of the fact that we have been unable to view or secure copies of certain data affecting the liability of Mr. Updike in the above matters, we have been unable to have a conference respecting all of the questions involved. We are, therefore, requesting that in the event you should from the brief submitted by us conclude that there exists a liability at law or in equity against the transferees of the assets of the Updike Grain Company, that before sixty day letters are sent out to such transferees, a further hearing be given us upon the situation as presented by the facts withheld from us, in the event a ruling is made that we are entitled to have such data.

"In connection with the interpretation of Sec. 280 of the Revenue Act of 1926, we hand you herewith a copy of a communication addressed to Honorable William R. Green, Chairman of Ways and Means Committee of the House of Representatives, by Mr. Edward P. Smith of Omaha, Neb.,
60 an attorney interested in a similar case. We also hand you a copy of Mr. Green's reply, setting forth his understanding of the intent of Congress respecting the import of Sec. 280.

"If we may have the honor of a reply to this communication, we will appreciate it if you will address it direct to the undersigned—A. G. Ellick, 700 First Natl Bk Bldg., Omaha, Nebraska."

That the letters exchanged between the said Edward P. Smith and William R. Green, and enclosed, as aforesaid, were as follows:

"November 19, 1926.

"The Honorable William R. Green,
Chairman, Ways and Means Committee,
House of Representatives,
Washington, D. C.

Dear Mr. Green:—

Some uncertainty seems to exist as to the true intent and meaning of Congress in adopting Section 280 of the Revenue Law of 1926, especially with reference to the right of the Revenue Department to make an assessment against the transferee of corporate property for the amount of tax theretofore assessed against the corporation where the right to proceed against the corporation for the collection of the tax so assessed, either by suit or other proceedings, had become barred by the statute of limitations before the enactment of the Revenue Law of 1926.

If it is not asking too much of you, and is not incompatible with your public duties, I would greatly appreciate a statement from you as to your understanding of the true meaning and intent of Congress in that regard.

61 Thanking you for your attention to this, and with personal regards, I am

Very truly yours,

(Signed) EDWARD P. SMITH"

"Committee on Ways and Means
House of Representatives
Washington, D. C.

November 19, 1926.

Mr. Edwin P. Smith,
Hotel Hamilton,
Washington, D. C.

My dear Mr. Smith:—

Replying to your inquiry with reference to the intention of Sec. 280 of the revenue law of 1926 in respect to the Statute of Limitations, I would say that so far as I am personally concerned, I had no intention of extending this statute to the cases which were barred by the Statute of Limitations prior to the enactment of the law of 1926. I have not talked with any other members of the Conference Committee and hence do not know what may have been in their minds.

This provision was, as you know, inserted in conference when there was no time to carefully examine the manner in

which it was framed or for any extensive discussion of its purposes. At the time, it was said that the object of the provision was to enable the Internal Revenue Bureau to bring a suit directly against the transferees of property involved in the tax levied, and I have no recollection of any other purpose being mentioned.

Very truly yours,

(Signed) W. R. GREEN"

That thereafter affiant received from D. H. Blair, Commissioner of Internal Revenue, the following communication dated December 7, 1926, in answer to affiant's letter of
62 November 20th, 1926:

"Receipt is acknowledged of your letter addressed to the General Counsel under date of November 20, 1926, concerning the matter of the income tax liability of the Updike Grain Company.

"It has been decided that no steps will be taken to assess against Mr. Updike any liability of the Updike Grain Company, as provided in Section 280 of the Revenue Act of 1926. The matter of bringing suit on an alleged agreement that the distributees, in the case of the Updike Grain Company, would pay the income tax liability of said company in the event the Government won in the suit brought in the matter of the liability of the Missouri Valley Elevator Company case, is being considered further and will be decided at a later date.

"Request was made for copies of any returns that may have been made up by the Collector or the Commissioner for the Updike Grain Company. Since Mr. Updike is not now a stockholder of that company, the company having been dissolved in 1917, and since no assessment under Section 280 of the Revenue Act of 1926 is to be made, we must decline to give any further information concerning such returns."

Shortly after April 2d, 1927, the date the bill of complaint was filed herein, affiant asked J. C. Kinsler, the United States District Attorney for Nebraska, to exhibit to affiant the records upon which the tax involved in the above case was based, and he replied that he would be glad to exhibit to affiant any and all papers that he might have in his possession, and upon which the claim is based, but that he had no
63 such papers in his possession, but would immediately obtain same from the authorities at Washington, when he would allow affiant to examine same; that on April 14th,

1927, defendant Gorton Roth transmitted to the Commissioner of Internal Revenue, at Washington, D. C., a request for copies of certain documents in the following form, approved by the Bureau of Internal Revenue in proceedings under Section 280 of the Revenue Act of 1926:

"In connection with the recent suit instituted in the United States District Court, for the District of Nebraska, Omaha Division, entitled "United States of America vs. Nelson B. B. Updike, et al". Equity No. 853, wherein tax liability is being asserted against me of $7,478.23, as a transferee or distributee of the assets of the Updike Grain Company, Omaha, Nebraska, I hereby request a copy of the return and essential related papers of Updike Grain Company, transferror, for the year 1917 and the fiscal year July 1st, 1916, to June 30th, 1917, in order that I may be fully advised as to the basis of the assessment made.

"I particularly request copies of the following papers and documents:

1—Original return of Updike Grain Company, for 11-month period ended June 30th, 1917, filed on or about September, 1917.

2—Excess profits tax return for the 11-month period ended June 30, 1917, filed on or about September, 1917.

3—Amended excess profits tax return for 11-month period, ended June 30, 1917, filed on or about September,
64 1917.

4—Final return covering period ended August 31st, 1917, filed on or about January 25th, 1918.

5—Statement of secretary of Updike Grain Company, dated on or about March 26th, 1918, respecting dissolution of company.

6—Reports made by Smith and/or Jones, upon examination of books of the company in October, 1918.

7—Any returns, schedules or reports, made by the Commissioner of Internal Revenue, or any collector, deputy collector, revenue agent or other representative of the Bureau of Internal Revenue, respecting the taxes for which liability is being asserted against me.

8—The assessment roll of the Commissioner of Internal Revenue, upon which was entered the above described assess-

ment against the Updike Grain Company, or so much thereof as shows the assessment and the date thereof.

9—The return, report, schedule or other document, upon which the assessment against the Updike Grain Company, described above, was endorsed.

"I am a transferee of the assets of said Updike Grain Company, Omaha, Nebraska."

That thereafter affiant made several inquiries of the said District Attorney, respecting receipt of said papers, and on May 5th, 1927, being advised that neither the file referred to above, nor photostat copies of same, had been received, and affiant being anxious to see said documents before preparing answer herein, went to Washington, D. C., with a
65 power of attorney from Gorton Roth, one of the defendants herein authorizing him to view the files, records and documents upon which said tax is based, and relating thereto; that said power of attorney was and is in words and figures following:

"The undersigned, a former stockholder in the Updike Grain Company and one of the defendants in the suit recently instituted in the United States District Court, for the District of Nebraska, Omaha Division, entitled "United States of America vs. Nelson B. Updike, et al", Equity Number 853, Hereby Constitutes and Appoints Alfred G. Ellick, whose address is 700 First National Bank Building, Omaha, Nebraska, and his partners and associates, his Attorney-at-Law and Attorney-in-fact, to represent him in the Bureau of Internal Revenue, and in the above entitled case, in connection with the Federal taxes proposed to be levied upon, or collected from, the stockholders of said company, with full power of revocation and substitution.

"You Are Hereby Expressly Authorized to discuss frankly with him, or his partners or associates, all matters in relation to said Federal taxes. Upon request of him or his partners or associates, you are authorized to exhibit to him, or them, or furnish to him or them, copies of any returns, schedules, Revenue Agent's reports, correspondence or any other documents in relation to said taxes, and particularly the following documents:

1—Original return of Updike Grain Company, for 11-month period ended June 30th, 1917, filed on or about September, 1917.

66 2—Excess profits tax return for the 11-month period ended June 30, 1917, filed on or about September, 1917.

3—Amended excess profits tax return for 11-month period, ended June 30, 1917, filed on or about September, 1917.

4—Final return covering period ended August 31st, 1917, filed on or about January 25th, 1918.

5—Statement of secretary of Updike Grain Company, dated on or about March 26th, 1918, respecting dissolution of company.

6—Report made by Smith and/or Jones, upon examination of books of the company in October, 1918.

7—Any returns, schedules or reports, made by the Commissioner of Internal Revenue, or any collector, deputy collector, revenue agent or other representative of the Bureau of Internal Revenue, respecting the taxes for which liability is being asserted against me.

8—The assessment roll of the Commissioner of Internal Revenue, upon which was entered the above described assessment against the Updike Grain Company, or so much thereof, as shows the assessment and the date thereof.

9—The return, report, schedule or other document, upon which the assessment against the Updike Grain Company, described above was endorsed."

That affiant before leaving for Washington, requested a letter from said United States District Attorney,
67 directed to the Bureau of Internal Revenue, or the attorneys for the Bureau of Internal Revenue, authorizing them to exhibit to affiant said files, records and documents, who stated that as the documents were not in his possession or charge, such letter would be useless and unnecessary; on the afternoon of May 9th, 1927, affiant interviewed Irwin R. Blaisdell, Head of the Civil Division of the Bureau of Internal Revenue, in his office at Washington, D. C., exhibited to him the power of attorney, aforesaid, identified himself as the attorney named therein, and requested an opportunity to view the files, records and documents aforesaid, for the declared purpose of ascertaining for and on behalf of the said Roth, the facts respecting the claims set forth in the amended bill of complaint, filed herein, relieving the Government of the necessity of sending the originals of said documents to Omaha, and expediting the hearing and trial of said case by stipulating with respect to said records; that the said Blaisdell stated that he had received requests

for photostat copies of certain documents from defendant Gorton Roth, defendant Ed P. Smith and from J. S. Kinsler, United States District Attorney, and that he had recently and at the same time forwarded all of said requests to the Government Department making photostat copies of records of that character, and that photostat copies were being made and would be forwarded to the above named persons as requested, at an early date. With respect to seeing the originals of the documents requested by Mr. Roth, or any other documents in said file, Mr. Blaisdell first stated that he did not have the papers in his possession, and when advised that he certainly could have the papers sent to him, he then advised affiant to return the next day, when he would advise affiant whether or not he could see said papers. Upon returning to the office of Mr. Blaisdell, the following
68 day, affiant was advised that, under the rules and regulations of the Treasury Department, he could not exhibit to affiant, either as attorney for Mr. Roth, or Mr. Updike, or as the attorney-in-fact, named in the Power of Attorney executed by Mr. Roth, or even to the said Updike or Roth, personally, any of the documents or files relating to said matter. At the insistence of affiant that he be referred to some one who might finally determine that question, affiant was taken to the office of P. C. Alexander, who examined said rules and regulations of the Department and Power of Attorney given to affiant by said Roth, and after reading the rules and regulations referred to by Mr. Blaisdall, stated that he did not think the rules referred to by Mr. Blaisdall applied to this particular case, but would not want to decide that matter, and suggested that Mr. Blaisdall take the matter up with Mr. C. M. Cherest, Assistant General Counsel for the Bureau of Internal Revenue. Being unable to reach Mr. Cherest that day, affiant was advised to return to the office of Mr. Blaisdell the following morning. Upon returning to the office of Mr. Blaisdell, the following morning, affiant and Mr. Blaisdall went to the office of Mr. Cherest, and after a conference between Mr. Blaisdell and Cherest, only, in his private office, affiant was asked into the conference, when affiant was advised that they had concluded that they could not exhibit the file or any of the matters referred to in the written request of said Roth, or the Power of Attorney of said Roth; that the case was in the hands of Mr. Kinsler, United States District Attorney, and that they would not wish to show the files without his consent; affiant offered to telegraph Mr. Kinsler for his consent, but Mr. Cherest advised that he would not wish to show the files even though Mr. Kinsler should

wire [autorhoty]; affiant stated that in a matter of this importance, he would wish to see the originals of said
69 files, and that he would not have an opportunity to do do so unless the original files were sent to Omaha, which affiant stated he understood was not the custom of the Department; thereupon Mr. Cherest stated that they would send photostat copies of the entire file to Mr. Kinsler, and if upon examination of same, with the consent of Mr. Kinsler, affiant concluded that he would wish to see the originals, they would send the originals out to Mr. Kinsler for affiant's examination.

Affiant further states that upon returning to Omaha, affiant ascertained that the photostat copies requested by Mr. Kinsler had been received by Mr. Kinsler, and that the photostat copies requested by said Roth and Smith had not been received; on May 24th, 1927, affiant requested the District Attorney to exhibit to him the photostat copies of the files which he had received, stating that the attorneys at Washington had advised him that the case was entirely in his hands and that it was entirely in his discretion as to whether or not the photostat copies of the files should be shown to affiant, whereupon the District Attorney advised that he would not wish to exhibit the files to affiant without the consent of the attorneys for the Bureau of Internal Revenue at Washington; thereupon affiant, under date of May 27th, 1927, addressed and mailed the following communication to Irwin R. Blaisdell, Washington, D. C.;

"Mr. Gorton Roth, who some time ago requested photostat copies of certain documents in connection with the tax assessed against the Updike Grain Company, advises that he has not received the copies, although we are advised by the District Attorney that the photostat copies requested by him, subsequent to our request, have been received by him. The District Attorney, however, refuses to show us these copies without written authority from Washington;
70 consequently we are in the same position that we were in when in Washington, when your Department refused to show us any of the documents upon which the tax is based, and referred us to the District Attorney here, to secure his permission to see the documents.

"We will appreciate it if you will write us that, so far as your Department is concerned, you are willing that we shall see the photostat copies of the files and records upon which

the tax against the Updike Grain Company is based, and which have been forwarded to the District Attorney at Omaha. We want to stop, if possible, being passed back and forth between the authorities at Washington and the District Attorney's office here. We will appreciate it if you will expedite transmission of the photostat copies requested by Mr. Roth.

"As stated to Mr. Alexander and Mr. Cherest, while in Washington the fore part of this month, it would seem to us that if the Government has a valid claim against Mr. Updike and the other stockholders of the Updike Grain Company, for the taxes asserted in the above suit, it ought to be willing to exhibit the record upon which it bases that claim, and if the records which have been repeatedly denied to us do not justify the claim, somebody in connection with the Government ought to be courageous enough to stand up and say so, and terminate these proceedings which now have all the aspects of persecution."

On June 4th, 1927, said Gorton Roth addressed and transmitted to the Commissioner of Internal Revenue, the following letter:

71 "Registered Omaha, Nebr. June 4, 1927.

Commissioner Internal Revenue,
Washington, D. C.

Attention IT:RF

Gentlemen:

On April 14, 1927 I requested copies of nine sets of papers and documents, this in connection with suit instituted in the United States District Court for the District of Nebraska, Omaha Division, entitled United States of America vs. Nelson B. Updike, et al., Equity No. 853, wherein tax liability is being asserted against me of $7,478.23 as a transferee or distributee of the assets of the Updike Grain Company, Omaha, Nebraska.

I have had no acknowledgment to this request and have not received the papers.

I will appreciate it if you will advise me promptly whether or not you received this request and whether or not I will be furnished with the documents requested.

Yours truly,

RW (Signed) GORTON ROTH

618 Omaha Grain Exchange"

Under date of June 8th, 1927, the following reply was received to the letter of affiant to Irwin R. Blaisdell, from A. W. Gregg, General Counsel for the Bureau of Internal Revenue:

"Answering your letter of May 27, 1927, addressed to Mr. Blaisdell of this office, in regard to photostat copies of certain documents heretofore requested by Mr. Gorton
72 Roth in connection with the above entitled suit, you are advised that the matter has been referred to the Department of Justice for appropriate action."

Under date of June 9th, 1927, the following reply was received to the letter of Gorton Roth to the Commissioner of Internal Revenue, dated June 4th, 1927, signed A. W. Gregg, General Counsel:

"Receipt is acknowledged of your letter of June 4, 1927, with reference to copies of papers and documents previously requested by you. You are advised that this matter was covered by a letter, date June 8th, 1927, addressed to your attorney, Mr. A. G. Ellick. A copy of said letter is herewith enclosed for your information."

No further answer to the letter of affiant to Mr. Blaisdell, dated May 27th, 1927, or to the letter of said Roth to Commissioner of Internal Revenue, dated June 4th, 1927, has been received, either from the offices of the Bureau of Internal Revenue, or of the General Counsel for the Bureau of Internal Revenue, or from the Department of Justice, to which said letters had been referred; that affiant continued to make requests upon the United States District Attorney, to examine the photostat copies of the files in his possession, and on June 13th, 1927, was advised that if he would appear at the office of the District Attorney on June 15th, at 9:00 o'clock, A. M., the photostat copies of the records in his possession would be exhibited; on said date, affiant
73 appeared at said office and there were exhibited to him photostat copies of the following documents:

Income tax return of said Updike Grain Company dated July 24th, 1917, filed July 25th, 1917;

Excess profits tax return of said company, dated August 29th, 1917, filed August 30th, 1917;

Amended excess profits tax return of said company, dated September 27th, 1917, filed September 28th, 1917;

Return form 1031, attached to which is a certificate dated March 26th, 1918;

Income tax return dated January 25th, 1918, filed January 29th, 1918;

Copy of a letter dated October 26th, 1918, to Commissioner of Internal Revenue from John J. Gillin, Revenue Agent in Charge at Omaha, Nebraska, transmitting report of L. C. Smith, of date October 25th, 1928, with exhibits and forms 1031 and 1103 attached thereto (minus forms 7894 mentioned therein);

Letter of date June 30th, 1919, to said Commissioner from said Revenue Agent in Charge, transmitting transmittal report of L. C. Smith, of date June 30th, 1919.

That the photostat copies exhibited to affiant were not in all respects legible and were not photostat copies of the entire file in the possession of the Government, relating to the tax involved herein, particularly correspondence between the Revenue Agents and the Commissioner of Internal Revenue or his subordinates, or between the Collector of Internal Revenue at Omaha, Nebraska, and the Commissioner of
74 Internal Revenue, respecting said tax, or between the Revenue Agent in charge at Omaha, Nebraska, and the Commissioner of Internal Revenue, respecting the said tax and the assessment thereof, or returns and amended returns made in connection with said tax, or the assessment roll showing the assessment against the Updike Grain Company, of said tax, and the date thereof, or the certification of said assessment to the collector of Internal Revenue at Omaha, Nebraska, or the abatement of the charges of said assessment against the Collector of Internal Revenue at Omaha, Nebraska, or numerous other papers in said file, the exact nature of which affiant is unable to state, all of which files are essential to a determination of the right to enforce collection of said taxes against the answering defendants herein, and to the defense of said answering defendants.

That on the 9th day of July, 1927, an order was entered herein authorizing the filing of interrogatories by the defendants represented by affiant, pursuant to the provisions of Rule 58 of the Rules of Practice of the Courts of Equity of the United States, and directing the persons named in said interrogatories to answer same. That upon the same date said interrogatories were filed herein to be propounded to D. H. Blair, Commissioner of Internal Revenue, T. F. Langley,

Chief of Proving Section, Income Tax Unit, Bureau of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska. That on July 11, 1927, said J. C. Kinsler, advised affiant over the telephone that he had just had a chance to glance over the interrogatories filed by said defendants and that he found that said defendants were asking for copies or originals of a number of
75 documents in the file of D. H. Blair, Commissioner of Internal Revenue; that it would be impossible for Mr. Blair to furnish such documents because of the said Kinsler had recently requested the Bureau of Internal Revenue to transmit to the said Kinsler the entire file and that same had been received by him about a week ago; that we were at liberty to examine the file then in his possession but on account of his engagements with the grand jury he would not be able to furnish same to us for examination until Monday, July 18, 1927. Affiant further states that on July 13, 1927, the said Kinsler advised affiant that he had not yet forwarded the interrogatories to Washington to be answered by D. H. Blair and T. F. Langley, and that he did not know whether it was his duty to attend to having them answered or not. Affiant advised the said Kinsler that he understood it was the duty of the attorney of record to attend to having said interrogatories answered, whereupon the said Kinsler stated that there might be some question as to whether or not the equity rule under which the interrogatories were filed applied to the United States Government.

Affiant further states that on July 18, 1927, some one representing himself to be from the office of the said Kinsler telephoned affiant stating that the said Kinsler would be unable to confer with affiant at 9:00 A. M. on said date as previously arranged, but would confer with affiant at the said Kinsler's office at 2:00 P. M. on July 19, 1927. At the last stated time affiant and Gorton Roth appeared at the office of the said Kinsler for an examination of the files in his possession, whereupon the said Kinsler stated that he had just had an opportunity to examine the interrogatories more
76 carefully and it seemed to him we were asking a great many questions he could not answer and he thought the proper thing to do would be to return the files to the Commissioner of Internal Revenue and forward to him the interrogatories to be answered. Affiant then inquired if the said Kinsler had in his possession the original income tax return of the Updike Grain Company, subscribed July 24th,

1917, whereupon the said Kinsler produced the income tax returns and reports, of which photostat copies had been shown to affiant on June 15, 1927, and the following additional documents:

Photostat copy of Page 14 of the Assessment Roll or List for January, 1920. Upon line one of which was endorsed the assessment against the Updike Grain Company, but the amount of assessment was not set out opposite the name of the Updike Grain Company, but on a line or two below said name, and opposite the name of the Updike Grain Company had apparently been pinned a slip of paper which obscured any entries which might have been made opposite said name.

Photostat copy of the Tax List Report of additional assessments for the District of Nebraska, January, 1920.

The original of the claim for abatement filed by the Updike Grain Company on or about February 19, 1920.

Certain personal returns of Nelson B. Updike.

Thereupon affiant and the said Roth requested the privilege of examining the entire file which had been transmitted to said Kinsler by the Bureau of Internal Revenue, which the said Kinsler refused, stating that a lot of it was cor-
77 respondence which we were not entitled to see. Affiant thereupon went through the interrogatories, filed, with the said Kinsler, calling for each document which had not been exhibited but same were not exhibited upon the statement of the said Kinsler that he did not have same in his possession.

Affiant further states that under Equity Rule 58 aforesaid, the answers to the interrogatories were required to be filed within fifteen days after they had been served, to-wit: On or before July 24, 1927, unless the time should be extended by the court or judge; that on July 20, 1927, at the request of the said Kinsler affiant executed a stipulation extending the time for filing answers to the said interrogatories to September 1, 1927; that on August 29, 1927, on application of a representative of the said Kinsler, an order was entered herein again extending the time for filing said answers to October 1, 1927. On October 1, 1927, the complainant had again failed to file said answers and was asking for additional time for filing same, and upon the objection of defendants the court directed complainant to file the answers which the said Kinsler admitted he then had in his possession, on or before October 6, 1927. That at said hearing said Kinsler stated to the

court that he had at all times been willing to furnish to the defendants any and all information and documents of which the government was possessed, relating in any way to the taxes involved in this action, without an order of court. That thereafter and on or about October 6, 1927, the answers of D. H. Blair, T. F. Langley, James J. Drakeford and A. B. Allen were filed in the above cause, and upon an examination being made of said answers and at the first opportunity
78 of affiant after attending to other engagements, affiant addressed to the said Kinsler, under date of October 25, 1927, the following communication.

"Hon. James C. Kinsler,
United States District Attorney,
Federal Building,
Omaha, Nebraska.

In re: United States of America vs. Nelson B. Updike, et al.
Equity No. 853.

Dear Sir:

We have examined the answers to the interrogatories filed by certain defendants in the above matter, and find that some of the interrogatories are not "fully" answered as required by equity rule 58, and that some of the answers suggest other interrogatories in order to elicit the entire facts respecting the liability for the tax involved in the above case. Inasmuch as you made the statement at the hearing before Judge Woodrough upon your application for additional time within which to file the answers, that you were willing to furnish us with any and all information and data of which the Government is possessed, respecting said tax, we are adopting this method of securing the additional information we desire, instead of applying for permission to file additional interrogatories, and trust you will give us the information requested within the next fifteen days so that we can have an early hearing of the above case.

In the answers filed by D. H. Blair, we direct your attention to the following:

1. In interrogatory No. 5 we asked (a) for the name of the person who computed and determined the amount of the assessment endorsed upon the return filed July 25, 1917; (b) when same was computed and determined; and (c) what official position was then held by the person com-
79 puting and determining same. The answer does not give us this information. In this connection we wish

you would advise the name of the person whose initials, which we read to be H. B., appear immediately to the right-hand side of the assessment stamp placed upon the return filed July 25, 1917; and the name of the person who endorsed the figures on the right-hand side of page four of the copy of the report of L. C. Smith, Revenue Agent, made to John J. Gillin under date of October 25, 1918; and whether or not the person whose initials appear immediately to the right of the assessment stamp computed and determined the taxes.

2. In connection with answer to interrogatory No. 13, we wish you would advise if, in the event the corporation audit division of the income tax unit did not figure the tax correctly, and it was changed by the proving section of the income tax unit, was it the practice of the Internal Revenue Bureau and the Commissioner of Internal Revenue, to note such change upon the return of the taxpayer, and if so, in what form that change would be noted.

3. Referring to the answer to interrogatories Nos. 17 and 18, we wish you would advise (a) the full names of the persons whose initials appear upon the bottom of the exhibit designated "Tax list report, additional assessments, income tax January, 1920", and what particular duty and office each of such persons performed with respect to the assessment made against the Updike Grain Company in the amount of $373,911.54; and (b) what matter was set out opposite the name of Updike Grain Company in line "O" of the exhibit entitled, "Assessment list, income tax, January, 1920", which has been covered up in the making of the photostat copy by a paper pinned over a part of this line.

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4. In the answer of Mr. Blair to interrogatories Nos. 29 and 30, you state that you are unable to produce the four forms No. 7894, which were transmitted to Mr. Blair in the letter from Mr. Gillin under date of October 26, 1918. If you are still unable to locate the form No. 7894, upon which was set forth a synopsis of the returns for the ear 1917, will you please furnish us with a blank form of that number?

5. In Mr. Blair's answer to interrogatory No. 47, he states that it does not appear that any affidavit was attached to the abatement claim. We are informed that there was an affidavit attached to the abatement claim and wish you would have another search made for same.

6. In the answer of Mr. Blair to interrogatory No. 60, will you please advise if the Bureau of Internal Revenue or the

Commissioner of Internal Revenue has collected assessments such as are therein described from others than the transferees of the assets of the Missouri Valley Elevator Company?

7. In the answer of Mr. Blair to interrogatory No. 68, he states that he is unable to find the affidavit of Gorton Roth, dated March 25, 1918, therein referred to. The writer understood from you that you had a copy of this affidavit and we will appreciate it if you will furnish a copy thereof to us.

8. The photostat copy of the letter of J. G. Bright, Deputy Commissioner, to the Collector of Internal Revenue at Omaha, dated December 30, 1924, attached to the answers
81 of Mr. Blair, refers to a letter of the Collector of Internal Revenue at Omaha to the Commissioner of Internal Revenue dated October 1, 1924. Will you please furnish us with a photostat copy of said letter of October 1, 1924?

9. The photostat copy of the letter of the Collector of Internal Revenue at Omaha to Mr. Blair, dated February 5, 1927, refers to Form No. 53 forwarded to Supervisor James R. Peat for transmittal to Mr. Blair's office on January 7, 1927. Will you please furnish us with photostat copy of the form thus transmitted and any letter of transmittal accompanying the same?

10. In the answer of Mr. Allen to interrogatory No. 42, he states that he is unable to find the letter of the Updike Grain Company to George L. Loomis, Collector of Internal Revenue, dated October 2, 1917. This letter must be in your possession as the record shows a letter of George L. Loomis to the Updike Grain Company answering same. We will appreciate it if you will have another search made for this letter and furnish us with photostat copy of same.

11. In the answer of Mr. Allen to interrogatory No. 64, he states that a copy of the assessment list and certificate of assessment, referred to in that interrogatory, has been supplied by Commissioner Blair in his answer to interrogatory No. 64. In this particular we also desire a photostat copy of the assessment list and certificate of assessment, which was actually forwarded to the Collector of Internal Revenue at Omaha. We wish you would furnish us with photostat copy of same.

12. The photostat copy of the report of C. L. Carlson to James J. Drakeford, dated December 21, 1921, attached to answer of James J. Drakeford, refers to department letter

IT:PA:FR:AGB: Nov. 30, 1921, copy of which is not
82 supplied and we wish you would furnish us with photostat copy of that [latter].

13. The photostat copy of the report of L. C. Carlson, Revenue Agent in Charge, to James J. Drakeford, dated December 21, 1921, refers to Exhibit H as an enclosure. Copy of Exhibit H has not been supplied and we wish you would furnish us with photostat copy of same.

14. The photostat copy of the letter of E. J. Batson, Deputy Commissioner, by A. Lewis, Chief of Section, to Internal Revenue Agent in Charge, Omaha, Nebraska, dated November 30, 1921, refers to a letter from the Internal Revenue Agent in Charge, Omaha, Nebraska, to Batson's office, dated February 16, 1921, and also to reports of the Internal [Referee] Agent in Charge, dated February 16, 1921. The letter of September 16, 1921, and the reports dated February 16, 1921, are not supplied and we wish you would furnish us with photostat copy of same.

Very truly yours,

BROGAN, ELLICK & RAYMOND,
AGE:AL By A. G. Ellick."

Under date of October 26, 1927, affiant received the following reply to said letter:

"Brogan, Ellick and Raymond,
Attorneys at Law,
First National Bank Building,

Omaha, Nebraska.

United States v. Updike and others.

Dear Sirs:
This is to advise you that further information requested by you will be furnished as soon, and so far, as possible.

Yours truly,

(Signed) JAMES C. KINSLER,
James C. Kinsler, United States Attorney."

JCK:LJ

On October 29, 1927, affiant was advised by the said
83 Kinsler orally that he had transmitted the request contained in affiant's letter of October 25, 1927, to the authorities in Washington and that the additional data and

information would be furnished to us within a week or ten days. On November 16, 1927, affiant addressed to the said Kinsler the following communication:

"Hon. James C. Kinsler,
United States District Attorney,
Omaha, Nebraska.

In re: United States of America v. Nelson B. Updike, et al.
Equity No. 853.

Dear Sir:

We wish to direct your attention to our letter of October 25, 1927, requesting additional data and information in the above matter; also to your reply under date of October 26, 1927, and to the writer's oral conversation with you on October 28, 1927, wherein you stated that you had transmitted the request in our letter, as above, to the authorities in Washington and that in your opinion the additional data and information would be furnished to us within a week or ten days.

Eighteen days have now passed since we talked to you and we are writing to inquire if you now have any better advices as to when the information and data will be supplied.

As we have stated to you and representatives of the Bureau of Internal Revenue frequently, the pendency of this stale claim against Mr. Updike and the other defendants, has been a great embarrassment to them in carrying on their respective business affairs and they are now, as they have been at all times in the past, anxious to have their li-
84 ability or non-liability determined at the earliest possible date.

We will therefore appreciate it if you will expedite as much as possible the furnishing of the additional data and information requested so that we may not again be subjected to the delay which the Government occasioned in connection with the answers to the written interrogatories heretofore filed in this case.

If you cannot immediately definitely ascertain when this additional information and data will be furnished, we will appreciate it if you will promptly so advise us so that we may exercise the privilege accorded us by the equity [ruls] to file additional interrogatories. This, as you know, we have not done on account of your assurances that the data and information will be furnished without such procedure.

Very truly yours,
BROGAN, ELLICK & RAYMOND,
By A. G. Ellick."

AGE:AL

On November 18, 1927, affiant received from the said Kinsler the following answer to the letter of November 16, 1927:

"Brogan, Ellick & Raymond,
Attorneys at Law,
First National Bank Building,
Omaha, Nebraska.

United States against Updike and others Number 853 Equity,
Omaha Division.

Dear Sirs:

This is to acknowledge receipt of your letter dated November 16, 1927, and to advise you that the writer is making further inquiry regarding the matter of the General Counsel of the Bureau of Internal Revenue.

You will be definitely advised during the early part of the coming week.

Yours very truly,

85 (Signed) JAMES C. KINSLER,
James C. Kinsler, United States Attorney."

Under date of November 25, 1927, affiant received the following additional communication from the said Kinsler:

"Brogan, Ellick & Raymond,
Attorneys at Law,
First National Bank Building,
Omaha, Nebraska.

United States vs. Nelson B. Updike, et al, Number 853 Equity.
Omaha Division.

Dear Sirs:

The writer is in receipt of a letter from the General Counsel of the Bureau of Internal Revenue in which the General Counsel says in substance that in his opinion the answers already given to the questions, which were propounded to the Commissioner and others, are as complete as it is practicable to make them, and that they fully answer the questions propounded.

The General Counsel points out that the additional questions have to do principally with administrative details which appear to be irrelevant to the issues in the suit.

Under the circumstances, the complainant must take the position that the information heretofore given constitutes

full compliance with its duty to answer the interrogatories propounded by the defendants.

Yours very truly,

(Signed) JAMES C. KINSLER,
James C. Kinsler, United States
JCK:G Attorney."

That owing to court engagements and other engagements of affiant, he has been unable to prepare additional interrogatories to be filed herein until this time.

Affiant believes that it is essential for a just determination of the above case that the complainant be required to
86 produce all of the facts and data requested in the interrogatories filed herewith and all other facts and data of which the complainant is possessed relating to the tax involved herein, that said information, facts and data are material to the issues involved in the above entitled case, and that it would be unsafe and unfair for the defendants represented by affiant to proceed to trial of the above case without being possessed of said facts and date.

A. G. ELLICK.

Subscribed in my presence and sworn to before me this 21st day of December, 1927.

(Seal) ALBERTA LYNCH,
Notary Public.

Endorsed: Filed Dec. 21, 1927. R. C. Hoyt, Clerk.

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87 Order Permitting the Filing of Additional Interrogatories.

Now on this 21 day of December, 1927, this cause came on for hearing upon the application of Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, defendants in the above entitled cause, for an order allowing them to file herein the additional interrogatories submitted with said application to be answered by such officers of complainant as are designated in a note at the foot thereof, and it appearing to the court

that complainant is a public corporation and that said additional interrogatories are for the discovery of facts and documents material to the defense of this cause,

It Is Therefore Ordered that said defendants be and hereby are given leave to file said additional interrogatories herein forthwith and that D. H. Blair, Commissioner of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector
88 of Internal Revenue, Omaha, Nebraska, officers of the complainant, a public corporation, shall separately and fully answer such of said additional interrogatories and furnish such of the documents therein requested as are designated in the note at the foot of said additional interrogatories, and said answers shall be in writing under oath, signed by the officers interrogated and filed herein within fifteen (15) days after service of same upon the solicitor for complainant.

By the Court:

J. W. WOODROUGH, Judge.

Endorsed: Filed Dec. 21, 1927. R. C. Hoyt, Clerk.

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89 (Motion of Defendants to dismiss filed February 29, 1928.)

Come now the defendants, Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, and respectfully object to the jurisdiction of this court over this controversy and pray that this action be dismissed as to each of them for the reason that by virtue of the provisions of Sections 280 and 274 of the Revenue Act of 1926, and particularly sub-divisions (a) of said sections, the complainant has no right or authority to proceed against said defendants in this court and this court has no jurisdiction over this controversy, all of which is shown by the pleadings and record herein.

FRANCIS A. BROGAN
A. G. ELLICK
ANAN RAYMOND
Solicitors for the above named Defendants.

Endorsed: Filed Feb. 29, 1928. R. C. Hoyt, Clerk.

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90 (Motion of Defendants to dismiss filed March 3, 1928.)

Come now the defendants, Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, and respectfuly show unto the court that this case does not really and substantially involve a dispute or controversy properly in the jurisdiction of this court, for the following reasons:

1. That this case was begun and commenced in this court since the enactment of the Revenue Act of 1926.

2. That this is an action to assess, enforce and collect an alleged liability, at law or in equity, of these defendants as transferees of property of the Updike Grain Company, a corporation, in respect of a tax alleged to have been imposed upon said Updike Grain Company by the Revenue Act of 1917.

3. That neither the Commissioner of Internal Revenue nor any other official of any Department or Bureau of complainant has at any time sent, given or mailed to these defendants, or either of them, the notice of such liability,
91 as required by sub-division (a) of Section 274 of the Revenue Act of 1926.

4. That none of these defendants has, by a signed notice in writing filed with the Commissioner of Internal Revenue, or otherwise, waived the restrictions upon the complainant or Commissioner of Internal Revenue, provided in Sub-division (a) of the Revenue Act of 1926, on the assessment or collection of the whole or any part of said alleged liability.

5. That no jeopardy assessment has been made or attempted to be made by the Commissioner of Internal Revenue of complainant against any of these defendants, for the tax or liability herein sought to be alleged or collected.

6. That none of these defendants has been adjudicated a bankrupt and this is not a bankruptcy proceeding.

7. That no proceedings have ever been instituted or had by complainant, or any of these defendants, before the United

States Board of Tax Appeals, with respect to said tax or liability.

All of which these defendants, and each of them, aver to be true and set up the same in bar of the complaint in the bill against them, and each of them, and pray the court to dismiss the said bill as to them, and each of them, and to give them, and each of them, judgment for their costs.

FRANCIS A. BROGAN
A. G. ELLICK
Solicitors for the above named defendants.

Endorsed: Filed Mar. 3, 1928. R. C. Hoyt, Clerk.

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92 (Order postponing hearing of Motions to Dismiss.)

September term, 1927. Before Judge Munger.

March 10, 1928.

Ordered, by the Court, that hearing on motions of defendants to dismiss, set for this date, be postponed until time of trial of the case.

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93 (Trial, March 26, 1928.)

September Term, 1927. Before Judge Munger.

This cause comes on regularly for trial to the Court, the parties heretofore appearing by their respective attorneys. Evidence is had, and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

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94 (Trial, March 27, 1928.)

September Term, 1927. Before Judge Munger.

This day this cause comes on for further proceedings. Testimony is adduced and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

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95 (Trial, March 28, 1928.)

September Term, 1927. Before Judge Munger.

This day again come the parties hereto by their respective attorneys, evidence is concluded, and said matter duly submitted to the Court.

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96 (Opinion of District Court.)

Munger, D. J.

In this suit the United States seeks to enforce against the transferees of the corporate assets of the Updike Grain Company, a corporation which dissolved August 28, 1917, the amount of a tax for a portion of the calendar year of 1917 which was assessed against the corporation under the provisions of the Revenue Act of October 3, 1917. The approved fiscal year of the Updike Grain Company began August 1, 1916 and ended on July 31, 1917. The essential facts in this case as to dissolution of this corporation in advance of the enactment of the Revenue Act of October 3, 1917 and as to a return made by the defendant under the Revenue acts then in force are quite similar to the facts in the case of United States vs. Updike, 1 Fed. (2d) 550 (on appeal 8 Fed. (2d) 913) relating to the Missouri Valley Elevator Company. In this case the Commissioner of Internal Revenue in January, 1920, made an assessment against the Updike Elevator Company of a tax under the Revenue Act of October 3, 1917, for the period involved, under the retroactive provisions of that Act. The purpose of the suit is to recover the amount of the tax assessed against the defendant from the transferees of the corporate assets.

97 The defendants challenge the jurisdiction of the court to determine this case, because of the provisions of Section 274 and Section 280 of the Revenue Act of 1926. The portions of the Sections involved are as follows:

"Section 280 (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed
98 with the Board, until the decision of the Board has become final."

It does not appear that a notice was given to the defendants as provided in the latter section and for that reason the defendants claim that this suit cannot now be maintained. If the effect upon this suit claimed by the defendants for the provisions of these statutes could be sustained if these provisions stood alone, a later portion in the same Revenue Act of 1926 found in Section 1122 (b) of that Act must also be considered. That portion of the statute reads as follows:

"The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions."

There appears to be a conflict between the two portions of the Revenue Act of 1926 which have been cited, and in case of such [repugnacy], the latter portion of the statute in the order of araringement will control. United States vs. Jackson, 143 Fed. 783, 787; In re Richards, 96 Fed. 935, 939. The objections to jurisdiction are not well taken.

The defendants also claim that this suit is barred by the statute of limitations relating to the recovery of taxes
99 of this nature. Section 278 d of the Revenue Act of 1926 is as follows:

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

By this statute Congress has provided that unless the taxpayer had agreed in writing to a longer period no suit in court for the collection of an assessment for any income tax, excess profits tax or war profits tax can be maintained unless the suit is begun within six years after the assessment of the tax. By the terms of this statute this limitation applies not only to the taxes imposed by the Revenue Act of 1926 but also to such taxes imposed by any prior Act of Congress.

No waiver of this limitation has ever been made by the defendants. The assessment was made in January 1920 and this suit was begun in April 1927, more than six years after the assessment, and the defendants have made the defense that the suit was begun too late. On behalf of the United States, the contention is made that this statute does not apply to the facts in this case, because the assessment was not made "within the statutory period of limitation applicable thereto." It may be doubted if the United States may take advantage of this limitation, which was imposed for the benefit of the taxpayer. It is said that unless the taxpayer has made a proper return there is no limitation of time in which the assessment may be made. But in this case an assessment was made. It was made by the Commissioner of Internal Revenue. It is the foundation of this suit. At the time it
100 was made the Revenue Act of 1916, as amended by the Revenue Acts of March 3, 1917, October 3, 1917, and February 24, 1919 was in force. Section 14 of the Act of 1916 in force at the time of the assessment contained the following:

a. * * * * "every corporation, joint-stock company or association, and insurance company, computing taxes upon the

income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within 105 days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of erroneous, false, or fraudulent returns, in which case the commissioner of internal revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this title or by existing law; and the assessment made by the commissioner of internal revenue thereon shall be paid by such corporation, joint-stock company or association or insurance company immediately upon the notification of the amount of such assessment; and to any sum or sums due and unpaid after the fifteenth day of June in any year, or after 105 days from the date on which the return of income is required to be made by the taxpayer, and after ten days' notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid and interest at the rate of 1 per centum per month upon said tax from the time the same becomes due; * * * * * *

(b) When the assessment shall be made, as provided in this title, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the commissioner of internal revenue and shall constitute public records and be open to inspection as such."

101 The Commissioner of Internal Revenue had authority under this portion of the statute and under the facts proved in this case, to make a return for the Updike Grain Company. A return is shown to have been made by a report to the Commissioner of Internal Revenue of revenue agents, after examination of the former returns and the books and accounts of the Updike Grain Company, and this return was adopted as a return and acting upon it as such, the Commissioner of Internal Revenue assessed the tax that is the subject of this suit. Whether the return was required to be made within three years or no limitation of time was imposed, the assessment was made in the statutory period of limitation applicable thereto.

The United States has provided, in the many revenue acts of this nature enacted in 1918 and subsequently, many periods of limitation after the expiration of which no action can be taken against the taxpayer, and the Supreme Court of the United States has said that "taxing laws are too liberally interpreted in favor of the taxpayer". Bowers vs. N. Y. &

Albany Co., 273 U. S. 346, 350. It seems to be clear, upon the facts in this case, that the United States delayed proceedings for the collection of the tax it claims to be due from the defendants, until the applicable statute of limitations had barred the successful prosecution of a suit and for this reason the suit will be dismissed at the plaintiff's costs.

Endorsed: Filed Apr. 13, 1928. R. C. Hoyt, Clerk.

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102 (Decree, April 13, 1928.)

In the District Court of the United States for the District of Nebraska, Omaha Division.

United States of America, Plaintiff,
853. vs. Equity.
Nelson B. Updike, et al., Defendants.

This cause having heretofore been submitted, it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER, Judge.

Endorsed: Filed Apr. 13, 1928. R. C. Hoyt, Clerk.

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103 (Order, May 2, 1928, Modifying Decree of April 13, 1928.)

In the District Court of the United States, District of Nebraska, Omaha Division.

United States of America, Plaintiff,
No. 853. vs. Equity.
Nelson B. Updike, et al., Defendants.

The order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

"This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts."

It is hereby modified so as to read:

"This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is hereby reentered as of this date, to all of which plaintiff excepts."

By the Court:

THOS. C. MUNGER, Judge.

May 2-1928.

Endorsed: Filed May 2, 1928. R. C. Hoyt, Clerk.

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104 (Order allowing Appeal, etc.)

On the 2nd day of May, 1928, this matter came on to be heard on Plaintiff's petition for leave to appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of this Court made and entered and filed herein April 13, 1928, as modified and re-entered May 2, 1928, dismissing Plaintiff's suit, and thereupon, the Court being fully advised in the premises, it is

Ordered that Plaintiff be, and Plaintiff is hereby granted leave to refile instanter Plaintiff's said petition for leave to appeal to said Circuit Court of Appeals for the Eighth Circuit, said petition having been filed herein May 1, 1928; that Plaintiff be, and Plaintiff is hereby given further leave to refile Plaintiff's Assignment of Errors filed herein May 1, 1928; and it is further

Ordered that Plaintiff be, and Plaintiff is hereby granted leave to amend Plaintiff's said petition for leave to appeal and Plaintiff's said assignment of errors so as to show the refiling and re-entering of said final order of this Court of April 13, 1928, as modified this 2nd day of May, 1928. Leave to Plaintiff to appeal to said Circuit Court of Appeals for the Eighth Circuit is granted by separate order.

By the Court:
THOS. C. MUNGER,
District Judge.

Endorsed: Filed May 2, 1928. R. C. Hoyt, Clerk.

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105 Assignment of Errors.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Plaintiff and Appellant,
Number 853. vs. Equity.
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo. Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed. P. Smith and George A. Roberts, Defendants and Appellees.

The United States of America, plaintiff and appellant, now comes and assigns the following errors of the trial court upon which plaintiff and appellant will rely in the prosecution of its appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of the trial court made and entered herein April 13, 1928, and modified and refiled and re-entered herein May 2, 1928, dismissing plaintiff's suit:

1. The trial court erred in finding and holding that plaintiff's suit is a suit for the recovery or collection of a tax or taxes from the defendants.

2. The trial court erred in finding and holding that plaintiff's suit is a proceeding "for the collection of the tax it claims to be due from the defendants."

3. The trial court erred in finding and holding that an assessment made by the Commissioner of Internal Revenue "is the foundation of this suit".

4. The trial court erred in finding and holding in
106 substance that the report of Revenue Agent L. C. Smith (Exhibit 2) was a return which fulfilled the requirements of the Revenue Act of October 3, 1917, and the regulations of the Treasury Department made and promulgated pursuant thereto, requiring Updike Grain Company to make returns for the taxes imposed on said corporation by said Revenue Act of October 3, 1917.

5. Referring to said report of Revenue Agent L. C. Smith, the trial court erred in finding and holding that "A return is shown to have been made by a report to the Commissioner of Internal Revenue, of revenue agents, after examination of the former returns and the books and accounts of the Updike Grain Company".

6. And the trial court, having erred in finding and holding said report of Revenue Agent L. C. Smith to be the return required by the Revenue Act of October 3, 1917, further erred in finding and holding as follows: "and this return was adopted as a return and acting upon it as such, the Commissioner of Internal Revenue assessed the tax that is the subject of this suit".

7. The trial court erred in finding and holding that a tax assessed against Updike Grain Company by the Commissioner of Internal Revenue" is the subject of this suit".

8. When Updike Grain Company neglected and refused to file returns on forms 1031 and 1103 for the taxes imposed

on said corporation by the Revenue Act of October 3, 1917, and as required by Article 61 of Regulations 33 revised of the Treasury Department and by Article 10 of Regulations 41 of the Treasury Department and when the Internal Revenue Department of the United States of America was thereby compelled to have L. C. Smith, one of its Revenue agents, make an audit of the books and records of said Updike Grain Company to determine the amount of taxable income of said corporation under the provisions of said Revenue Act of October 3, 1917, the trial court erred in finding and
107 holding in substance that the report of said revenue agent to the Revenue Agent in Charge at Omaha, Nebraska, constituted the return required by said Revenue Act of October 3, 1917, and said Regulations of the Treasury Department of the United States of America.

9. This is a suit in equity and was brought against defendants, former stockholders of Updike Grain Company, a Nebraska corporation, to compel defendants, as trustees, to account for and pay over to complainant money had and received from said corporation by defendants for the use and benefit of complainant and the trial court erred in not considering said theory of complainant and the subject matter of complainant's suit in equity as set forth in complainant's amended bill of complaint.

10. The trial court erred in finding and holding that in this action (where defendants have been sued by the United States of America and have pleaded that the prosecution of the government's action against them is barred by some statute or statutes of limitation) there should be a liberal construction of the statutes of limitation pleaded, in favor of the defendants.

11. The trial court erred in finding and holding that the Commissioner of Internal Revenue made a return for Updike Grain Company for the taxes imposed on the corporation by the Revenue Act of October 3, 1917, when the Commissioner of Internal Revenue used the information contained in the report of Revenue Agent L. C. Smith (Exhibit 2) in order to make an assessment against Updike Grain Company during the month of January, 1920.

12. The trial court erred in finding and holding that Section 278 (d) of the Revenue Act of 1926 is a statute of limitations properly applicable to complainant's suit; and that

the prosecution of complainant's suit is barred by the
108 provisions of said Section 278 (d) of the Revenue Act of 1926 and that "for this reason the suit will be dismissed at the plaintiff's costs".

13. The trial court erred in finding and holding that the prosecution of complainant's suit is barred by a statute of limitations applicable thereto "and for this reason the suit will be dismissed at plaintiff's costs."

14. The trial court erred in finding and holding as follows: "It seems to be clear, upon the facts in this case, that the United States delayed proceedings for the collection of the tax claims to be due from the defendants, until the applicable statute of limitations had barred the successful prosecution of a suit and for this reason the suit will be dismissed at the plaintiff's costs".

15. The trial court erred in making and entering herein on the 13th day of April, 1928, the final order, judgment or decree, (modified and refiled and re-entered herein May 2, 1928) dismissing complainant's suit from which complainant prosecutes this appeal; said final order, judgment or decree being as follows:

"Order"

"This cause having heretofore been submitted, it is ordered that plaintiff's suit be dismissed at plaintiff's costs, to which plaintiff excepts.

THOS. C. MUNGER,
Judge."

As appears from said final order, judgment or decree complainant was duly allowed an exception thereto, and was likewise allowed an exception to the re-entry of said decree as modified.

15. And said final order, judgment or decree as modified May 2, 1928, being as follows:

"Order"

"The Order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

'This cause having heretofore been submitted, it is ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts.'

109 "Is hereby modified so as to read:

"This cause having heretofore been submitted, it is ordered, that the plaintiff's suit be dismissed, each party to

pay his own costs; and as so modified the decree is hereby re-entered as of this date, to all of which plaintiff excepts.

"By the Court:

THOS. C. MUNGER,
Judge."

May 2—1928

16. The trial court erred in finding and holding that the present suit against the defendants as trustees is barred by the limitations provisions of Section 278 (d) of the Revenue Act of 1926, which was enacted only for the benefit of persons other than the defendants in the present action, namely, for the benefit of taxpayers.

17. The trial court erred in finding and holding that said limitation provisions of Section 278 (d) of the Revenue Act of 1926, enacted only for the benefit of taxpayers, could be invoked by the defendants in the present suit.

18. The trial court erred in finding and holding as follows:

"In this suit the United States seeks to enforce against the transferees of the corporate assets of the Updike Grain Company a corporation which dissolved August 28, 1917 the amount of a tax for a portion of the calendar year 1917 which was assessed against the corporation under the provisions of the Revenue Act of October 3, 1917".

19. The trial court erred in referring to Updike Grain Company as "The Defendant".

20. The trial court erred in referring to Updike Elevator Company as "The Defendant".

21. The trial court erred in finding and holding as follows:

"The essential facts in this case as to the dissolution of this corporation in advance of the enactment of the Revenue Act of October 3, 1917 and as to return made by the defendant under the Revenue Acts then in force are quite similar to the facts in the case of United States vs. Updike,
110 1. Federal (2d) 550".

22. The trial court erred in finding and holding as follows:

"In this case the Commissioner of Internal Revenue in January, 1920, made an assessment against the Updike Elevator Company of a tax under the Revenue Act of October

3, 1917, for the period involved, under the retroactive provisions of that act. The purpose of the suit is to recover the amount of the tax assessed against the defendant from the transferees of the corporate assets".

All of which is respectfully submitted.

Dated this first day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Complainant.

23 The trial court erred in re-entering herein on the 2nd day of May, 1928, the final order of the Court of April 13, 1928, as modified dismissing plaintiff's suit and reading as follows:

"Order"

"The Order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

'This cause having heretofore been submitted it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts'.

"Is hereby modified so as to read:

"This cause having heretofore been submitted it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is hereby re-entered as of this date, to all of which plaintiff excepts.

Filed May 2, 1928, R. C. Hoyt, Clerk.

"By the Court

THOS. C. MUNGER, Judge."

May 2-1928.

To all of which the plaintiff at the time duly excepted.

Dated this second day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff.

Endorsed: Filed May 1, 1928, R. C. Hoyt Clerk.

Endorsed: Refiled May 2, 1928, R. C. Hoyt, Clerk.

111 Petition for Appeal.

Now comes the complainant, United States of America, by James C. Kinsler, United States Attorney for the District of Nebraska, and complainant, conceiving itself aggrieved by the final order, judgment or decree made and entered April 13, 1928, in the above entitled cause dismissing complainant's suit and reading as follows:

"Order"

This cause having heretofore been submitted, it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER."

and by said final order, judgment or decree as modified by the Court May 2, 1928 and reading as follows:

"Order"

"The order and decree heretofore entered in this case on Apil 13, 1928, which reads as follows:

'This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts.'

"Is hereby modified so as to read:

'This cause having heretofore been submitted it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is
112 hereby re-entered as of this date, to all of which plaintiff excepts.

By the Court,

THOS. C. MUNGER, Judge."

May 2-1928.

does hereby appeal from said final order, judgment or decree of this Court, original and as modified and re-entered to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and complainant prays that this appeal may be allowed and that a citation may be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said final order, judgment or decree of this Court was made, duly authenticated, may be sent to

said United States Circuit Court of Appeals for the Eighth Circuit.

Dated this first day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Complainant.

Endorsed: Filed May 1, 1928, R. C. Hoyt, Clerk.

Endorsed: Filed May 1, 1928, R. C. Hoyt Clerk.

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113 Order Allowing Appeal.

Upon reading the Petition of complainant, United States of America, dated May 1, 1928, for the allowance of an appeal herein and on consideration of the Assignment of Errors presented therewith, including Assignment 23 made this second day of May, 1928.

Ordered that the appeal as prayed for be and it is hereby allowed and that a certified transcript of the record and proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, and it appearing that this appeal is taken by direction of a department of the Government, to-wit, the Department of Justice, it is further

Ordered that the said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellant, United States of America, either to prosecute said appeal or to answer in damages or cost.

Dated this 2nd day of May, 1928.

By the Court

THOS. C. MUNGER,
United States District Judge.

Endorsed: Filed May 2, 1928. R. C. Hoyt, Clerk.

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114 Notice of Lodgment of Statement of Evidence.

The above named defendants and their attorneys will take notice that complainant has lodged a "Statement of Evidence" for the Transcript of the Record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause in the office of the Clerk of said United States District Court for the District of Nebraska, Omaha division, for your examination.

And you are further notified that Complainant will present said matter to the Court and ask the Court to examine and approve said "Statement of the Evidence" at half past 10 o'clock in the forenoon of the 14th day of May, 1928, or as soon thereafter as counsel for complainant can be heard.

JAMES C. KINSLER,
United States Attorney,
Attorney for Complainant.

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115 District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May 1928, I received this Notice of Lodgment of Statement of Evidence, and on the 2nd day of May 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN.
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May, 1928, I received this Notice of Lodgment of Statement of Evidence, and on the 3rd day of May, 1928 I served the same upon the within-named defendant Ed. P. Smith, Attorney for himself, at Omaha, in Douglas County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

---

116 District of Nebraska—ss.

I hereby certify and return that on the 2nd day of May, 1928, I received this Notice of Lodgment of Statement of Evidence and on the second day of May, 1928 I served the

same upon the within-named Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Notice of Lodgment of Statement of Evidence with the exception of the defendants, Ed. P. Smith and George A. Roberts, by delivering a certified copy of said Notice of Lodgment of Statement of Evidence to Francis A. Brogan, Senior Member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

Endorsed: Filed May 3, 1928, R. C. Hoyt, Clerk.

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117 Citation.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant and Appellant.
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts, Defendants and Appellees.

United States of America to Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts—Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Omaha division, wherein United States of America is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and
118 why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Judges of the District Court of the United States for the District of Nebraska, this 2nd day of May, 1928.

THOS. C. MUNGER
United States District Judge,
District of Nebraska.

District of Nebraska—ss:

I hereby certify and return, that on the 2nd day of May 1928, I received this Citation, and on the 3rd day of May, 1928, I served the same upon the within-named defendant, Ed. P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return, that on the 2nd day of May 1928, I received this Citation, and on the 2nd day of May 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the 2nd day of May, 1928, I received this Citation and on the second day of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Citation with the exception of the defendants, Ed P. Smith and George A. Roberts, by delivering a certified copy of said Citation to Francis A. Brogan, Senior member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis.
Deputy United States Marshal.

Endorsed: Filed in U. S. District Court on May 3, 1928.

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119 Notice of Appeal

United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant and Appellant,
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo. Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts, Defendants and Appellees.

The above named defendants and their attorneys will take notice that the complainant, United States of America, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of the trial court made and entered herein April 13, 1928, dismissing complainant's suit and reading as follows:

"Order"

"This cause having heretofore been submitted it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER, Judge."

That complainant's said appeal is taken for the purpose of reviewing the proceedings at the trial of complainant's said suit and for the purpose of reversing said final order, judgment or decree of the trial court from which this appeal is taken, and for the further purpose of having a decree rendered in accordance with the prayer of complainant's amended bill of complaint.

120 You are further notified that in prosecuting this appeal complainant will rely on assignment of errors filed in the office of the Clerk of said Court in which this action is pending.

And you and each of you are hereby further notified to be and appear in said United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the date of this notice of appeal, to show cause, if any there be, why said final judgment, order, or decree appealed from should not be corrected and why speedy justice should not be done the parties in that behalf.

Dated this 1st day of May, 1928.

JAMES C. KINSLER
United States Attorney,
Attorney for Complainant.

District of Nebraska—ss:

I hereby certify and return, that on the first day of May, 1928, I received this Notice of Appeal, and on the second day of May, 1928 I served the same upon the defendant, Ed P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return, that on the first day of May, 1928 I received this Notice of Appeal, and on the first day of May, 1928, I served the same upon [the] Warren H. Howard, Attorney for the defendant George A. Roberts at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the first day of May, 1928, I received this Notice of Appeal and on the first day of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of Record for all of the defendants named in the caption of said Notice with the exception of the defendants, Ed P. Smith and George A. Roberts, by delivering a certified copy of said Notice to Francis A. Brogan, Senior member of said Law Firm at his office in the First National Bank Building in the city of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

Endorsed: Filed in U. S. District Court on May 3, 1928.

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121 Notice of Appeal.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Plaintiff and Appellant,
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. T. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey,

real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts, Defendants and Appellees.

The above named defendants and their attorneys will take notice that the plaintiff, United States of America, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of the trial court made and entered herein April 13, 1928, dismissing plaintiff's suit and reading as follows:

"Order"

"This cause having heretofore been submitted it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER, Judge."

and from the order of said Court made and entered herein May 2, 1928, modifying and re-entering said final order, judgment and decree and reading as follows:

"Order"

"The Order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

'This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts.'

"Is hereby modified so as to read:

122 "This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is hereby re-entered as of this date, to all of which plaintiff excepts.

By the Court,

THOS. C. MUNGER,

May 2-1928 Judge"

That plaintiff's said appeal is taken for the purpose of reviewing the proceedings at the trial of plaintiff's said suit and for the purpose of reversing said final order, judgment or decree of the trial court as modified and re-entered May 2, 1928, from which this appeal is taken, and for the further purpose of having a decree rendered in accordance with the prayer of plaintiff's amended bill of complaint.

You are further notified that in prosecuting this appeal plaintiff will rely on assignment of errors refiled in the office of the Clerk of said Court in which this action is pending May 2, 1928, and on Assignment No. 23 filed May 2, 1928.

And you and each of you are hereby further notified to be and appear in said United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the date of this notice of appeal, to show cause, if any there be, why said final judgment, order or decree appealed from, as modified and reentered May 2, 1928, should not be corrected and why speedy justice should not be done the parties in that behalf.

Dated this 2nd day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff.

District of Nebraska—ss:

I hereby certify and return, that on the 2nd day of May, 1928, I received this Notice of Appeal, and on the 2nd day of May 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the 2nd day of May, 1928, I received this Notice of Appeal, and on the 3rd day of May 1928, I served the same upon the within-named defendant Ed P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the 2nd day of May, 1928, I received this Notice of Appeal and on the second day

of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Notice of Appeal with the exception of the defendants, Ed P. Smith and George A. Roberts, by delivering a certified copy of said Notice to Francis A. Brogan, Senior Member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

Endorsed: Filed in U. S. District Court on May 3, 1928.

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123 Statement of Evidence.

Be It Remembered, that at a regular term of the United States District Court for the District of Nebraska, Omaha Division, held at Omaha, Nebraska, on March 26, 1928, Honorable Thomas C. Munger, United States District Judge, presiding, the above entitled action was called for trial and the trial thereof was commenced on said twenty-sixth day of March, 1928, and continued until March 28, 1928, when it was concluded and the case duly submitted to the Court.

James C. Kinsler, United States Attorney, Sewall Key, Special Assistant to the Attorney General of the United States, and I. R. Blaisdell, Special Attorney for the Bureau of Internal Revenue of the United States, appeared as counsel for complainant.

Brogan, Ellick and Raymond, Ed P. Smith and Warren Howard appeared as counsel for the defendants.

124 At which hearing the various parties respectively offered and introduced evidence, both oral and documentary, as hereinafter set forth; objections were made thereto, rulings were had on such objections and exceptions taken to such rulings respectively as follows:

Complainant's Evidence in Chief.

Examination

By Mr. Blaisdell:

Gorton Roth, complainant's first witness, being duly sworn, testified that he is now Secretary of Updike Grain

Corporation; that he was formerly and until the date of its dissolution during the month of August, 1917, Secretary of Updike Grain Company, a Nebraska corporation, "the one that is mentioned in this law suit". The name Gorton Roth signed to the letter, Exhibit number 1, is the signature of witness. Witness sent this letter to the Collector of Internal Revenue at Omaha, Nebraska, on or about March 26, 1918.

Complainant offered in evidence Exhibit number 1 which is blank corporation income return mailed to the Collector of Internal Revenue, Omaha, Nebraska, by Gorton Roth under date of March 26, 1918—this exhibit constitutes both the blank income tax return and the letter attached thereto.

Exhibit number 1 was offered and received in evidence without objection, and is as follows: one photostat showing Exhibit number 1 with attached letter of witness folded, the second photostat showing Exhibit number 1 with attached letter of witness open, and the third photostat showing the back or reverse side of Exhibit number 1.

Supplemental 11 Mos 6/30/17

CAUTION

d this form and all tal
ions carefully and fill
plementary statement
ack of return first.
totals in supplementary
statement must agree with
totals on face of return.

Form 1031 (Revised January, 1918).—UNITED STATES INTERNAL REVENUE

CORPORATION INCOME TAX RETURN

(FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES)

Return of annual net income for the calendar year 1917.
fiscal year ended ..... 19....

(Do not write in this space.)
RECEIVED
MAR 30 1918
LIST.
Number | Page. | Line.
Audited by

Name of corporation Updike Grain Company.

Principal office 603 Grain Exchange Building, Omaha, Nebraska.

Kind of business carried on

Date of organization Aug. 21, 1899.

1. Total amount of paid-up capital stock outstanding at the close of the year or if there is no capital stock the capital using that interest-bearing indebtedness employed in the business during the year:

(a) Paid-up common stock $

(b) Paid-up preferred stock

[illegible] date of dissolution, if not in [illegible] and the date of [illegible]

27, 1917, on which date the Company was duly dissolved in pursuance of the laws of the State of Nebraska, and since said date the said corporation has not been in existence. Prior to the dissolution of said Company in pursuance of Article 65 of the Income Tax Regulations, then in full force and effect as supplemented by ruling of the Acting Commissioner of Internal Revenue under date of March 22nd, 1917, the said corporation retained from its assets and paid federal income tax and excess profits tax for the fractional [illegible]

2. Total a[illegible]
of the
sub[illegible]
of inc[illegible]
subse[illegible]

3. (a) Gro[illegible]

(b) Incom[illegible]

(c) Income from interest (see item 6 on back of return)

(d) Income from dividends (see item 7 on back of return)

(e) Income from all other sources (see item 8 on back)

Total gross sales and other income

Less total deductions

8. Total net income

Less: (a) Excess profits tax (item 12)

(b) Dividends received out of earnings of 1913, 1914, 1915

Total (a plus b)

9. (a) Amount taxable at 2% (item 8 less total of [illegible])

(b) Amount taxable at 4% (item 8)

10. Amount of total net income shown in item

Less: (a) Excess profits tax (item 12) $

(b) Dividends received [illegible]
Total (a plus b)

11. Amount taxable at 4% (item 10 less total of a plus b)

If return is made for a full fiscal year ended in 1917, compute tax on as many twelfths of item 11 as there are months from January 1, 1917, to the close of the fiscal year. Enter amount taxable here

(c) Paid-up preferred stock

(d) Surplus and undivided profits

(e) Bonded indebtedness

(f) Other interest-bearing indebtedness

(g) Accounts payable

(h) Reserves for taxes, depreciation, depletion, etc.

(i) Other liabilities

(j) Total

(a) Gross sales

(b) Less returns and allowances

(c) Net sales

(d) Cost of goods sold

(e) Gross profit on sales

(f) Other profits (detail)

(g) Total gross income

(a) Expenses (detail)

(b) Losses sustained (not entered elsewhere)

(c) Depreciation charged off

(d) Depletion charged off

(e) Interest paid (except as entered under 6b and 6c)

(f) Interest paid on deposits (for banks only)

(g) Interest paid on indebtedness wholly secured by collateral

7. (a) Domestic corporations (not including income and excess profits taxes)

(b) Foreign taxes paid

(c) Total deductions

TAX

13. Amount of excess profits tax (see instructions below)

14. Amount at 2% tax (2% of item 9a)

15. Amount at 4% tax (4% of item 9b)

16. Amount at 4% tax (4% of item 11)

17. Total tax assessable

We, the undersigned, president and treasurer of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me this ..... day of ....., 19.....

Seal of officer taking affidavit.

President.

Treasurer.

GENERAL INSTRUCTIONS.

Excess profits tax. For the purpose of the excess profits tax every corporation subject to income tax shall be deemed to be engaged in business, and all the trades and businesses in which [illegible] shall be deemed to be a single trade or business, and all its income from whatever source derived shall be deemed to be received from [illegible]

[illegible] This excess profits tax is equivalent to 8 percent of the net income in excess of $3,000, [illegible] which the employment of capital is not necessary and the earnings of which are to be ascribed [illegible]

In the case of corporations [illegible] invested capital, the excess profits tax is equal to various percentages of the net income, depending on its ratio to the invested capital for the taxable year. Every corporation must make a return of its invested capital and compute the amount of tax on Form 1103.

For further information [illegible] Regulations No. 41 [illegible] the War Excess Profits Tax. A copy can be obtained from any collector of internal revenue.

Time of filing returns. [illegible] year ended December 31, 1917, or before March 1 [illegible] the collector of internal revenue of the district in which is located the principal [illegible]

"Fiscal year." [illegible] desiring to make return of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to March 1 of the year in which [illegible] to be due, file with the collector a notice in writing designating the last day of some month as the close of such fiscal year. A return [illegible] for the fiscal year must be filed on or before the first day of March of the next calendar year, and the return [illegible] must be filed within sixty days after the closing date of the fiscal year so established.

Extension of time. [illegible] within the prescribed time, the collector is authorized to grant an extension of the filing period not exceeding 30 days from the normal due date. [illegible] Extension [illegible] application for such extension is made in writing prior to the expiration of the period for which extension [illegible]

Signature and attestation. [illegible] executed by two officers of the corporation, that is, by the president, vice president, or other principal officer, and the treasurer or other [illegible] authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return [illegible] provided for the purpose.

Subsidiary companies. The corporation making this return must attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. Each subsidiary [illegible] separate and distinct return.

Foreign corporations. [illegible] required to make returns to the collector of the district in which is located the principal place of business or agency through which it [illegible] United States, or if the corporation has no place of business or agency in the United States, its return will be filed with the collector of internal revenue at [illegible] The gross income to be returned is that received from business transacted and capital invested in the United States, including interest on bonds, notes, or other [illegible] residents, corporate or otherwise, and including income derived from dividends on capital stock or from net earnings of resident corporations, [illegible] corporations whose net income is taxable under this law. The deductions allowable are those losses and disbursements incident and necessary to the transaction [illegible] specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business [illegible] If a foreign corporation has no place of business or agency in the United States and no return is made, the tax on income from interest [illegible]

Penalties. [illegible] to file returns within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding $10,000, [illegible] In case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return, shall be added to the [illegible] agency, if the return is voluntarily filed without notice from the collector, and it is shown that delay in filing was due to reasonable cause [illegible] additional tax will not be assessed. A statement of the cause of delay must be attached to each delayed return.

Any officer [illegible] fail to make, render, sign, or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

Supplemental 11 mo. 6/30/19

CAUTION

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Supplemental 11 mo. 6/30/19

Form 1031 (Revised January 1918) UNITED STATES INTERNAL REVENUE

CORPORATION INCOME TAX RETURN

FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES

Return of annual net income for the calendar year 1917
[illegible] 19

Updike Grain Company,
603 Grain Exchange Building, Omaha, Nebraska.

Date of organization Aug. 21, 1899.

Omaha, Nebr., March 26, 1918.

To the Collector of Internal Revenue,
for the District of Nebraska,
Omaha, Nebraska.

Dear Sir:-

The Updike Grain Company was organized under the laws of the State of Nebraska August 21, 1899 and did business up to August 27, 1917, on which date the Company was duly dissolved in pursuance of the laws of the State of Nebraska, and since said date the said corporation has not been in existence. Prior to the dissolution of said Company in pursuance of Article 56 of the Income Tax Regulations, then in full force and effect, as supplemented by ruling of the Acting Commissioner of Internal Revenue under date of March 22nd, 1917, the said corporation retained from its assets and paid federal income tax and excess profits tax for the fractional part of the year 1917, such payments being made in pursuance of the final return duly made and filed in accordance with said rulings.

Prior to the said dissolution of said corporation all of the indebtedness of the said corporation was liquidated and paid in full, and at the time of said dissolution the said corporation had no indebtedness whatsoever outstanding or unpaid and had no creditors.

At the time of said dissolution a final distribution of all of the assets of said corporation was made, and all of said assets were paid as a final dividend to stockholders, such payment being made in accordance with the law of the State of Nebraska. Since said payment the said corporation has not been in existence, nor is there in existence any money or other property of said corporation, nor are there any officers, directors or stockholders.

I am addressing this communication to you because I held the position of Secretary of said corporation prior to its dissolution, and because I am aware of regulation known as Article 61 of the regulations in reference to the income tax Act of October 3rd, 1917 (but which I am advised is erroneous), and in order that a statement of the facts in this matter may be made for your records.

Yours truly,

Not Consolidated
Consolidated return filed
Approved
Chief of Section

(Do not write in this space.)
RECEIVED
LIST.
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SUPPLEMENTARY STATEMENT

The following information must be furnished, either on the blanks or on [illegible] by every corporation, joint-stock company, [illegible] Without such information the return will not be accepted as complete. The [illegible] below relate to the correspondingly numbered items of Form

3. (c) FROM INTEREST.

Interest to be reported as income for the purpose of the income tax includes all interest received on bonds or securities owned by the corporation, except interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions.

3. (d) FROM DIVIDENDS RECEIVED.

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned (under Item 3 (d) on front page of this form) by the receiving corporation as income of the year in which the distribution was made or ordered to be made and will be taxed at the rates prescribed by law for the year in which surplus or profits distributed were earned, viz., 1% on amounts received out of earnings of 1913 (subsequent to March 1, 1913), 1914, and 1915, and 2% on amounts received from earnings of 1916 and 1917. A statement from the corporation paying the dividends included herein should be attached to this return, showing separately the amount of dividends paid out of earnings of each year; otherwise, they will be deemed to have been paid out of the earnings of 1917 and will be taxed 2%. The receiving corporation, in order that tax may be computed on dividends received in 1917 at the rates applicable to the years in which the profits were earned, must fill in the following form:

Dividends received in 1917 out of profits accrued each year subsequent to March 1, [illegible]

1913	1914	1915	1916	1917
$	$	$	$	$

3. (e) FROM OTHER SOURCES.

	$
Total	$

4. (a) COST OF GOODS AND OTHER PROPERTY SOLD.

Report the cost of goods sold in the following form:

Merchandise bought for sale	$	
Cost of manufacturing (if other than purchased, such as materials shown on books). (Do not include items of expense.)		
Plus inventories at beginning of year		
Total	$	
Less inventories at end of year		
Net cost of goods sold		$

Explanations

If the corporation makes inventories of merchandise or materials, explain the basis on which they are made, whether (a) at cost, or (b) at cost or market value, whichever is lower, and (c) [illegible] goods made, [illegible] as entered [illegible] inventories, but report [illegible] or purchased during the year. If the cost of manufacture [illegible] is not kept separate from general expenses in the corresponding [illegible] in "Expenses, general," below.

[illegible] any [illegible] year should report the cost of the property sold in the [illegible]

1. Original cost of [illegible]	$
2. Market value March 1, 1913, if acquired before that date	
3. Cost of subsequent improvements, if any	
4. Depreciation and depletion to date of sale	
5. Net cost (Item 1 or Item 2 plus Item 3 minus Item 4)	

State how market value March 1, 1913, was determined

Does such value include any good will? If so, how much? $

4. (b) EXPENSES, GENERAL.

This item should include only the ordinary and necessary expenses paid within the year in the operation of the business and maintenance of the property of the corporation, itemized as per schedule below. It must not include any expenditures reported under 4 (a), 5, 6, or 7.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation charges.

Payments made to officers or employees, who are stockholders, in the guise of salaries or compensation, the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

1. Salaries of officers	$
2. Labor, wages, commissions, etc. (not included in cost of manufacturing or otherwise producing goods" under 4 (a))	
3. Rents, royalties, and other payments in lieu of rent	
4. Repairs, ordinary and incidental	
5. Other expenditures (classify):	
Total expenses	$

If salaries were increased or extra compensation was paid to officers, state the amount, the reason therefor, and the basis on which computed

5. (a) LOSSES.

Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear, and tear. The losses, not compensated by insurance or otherwise, must be absolute, complete, actually sustained during the year, and charged off on the books of the corporation.

Kind of property on which loss is claimed.	Cost of property.	Cause of loss.	Amount charged off within year.
			$
			$

Reverse of back of p. 1

When were the deducted losses ascertained to be such?

How were they so ascertained?

The cost of property lost should be determined as indicated in Item 4 (a).

A bad debt offsetting income accrued since January 1, 1913, will not be allowed as a deduction unless the amount was reported as income for the year in which the debt was created.

State how the debts charged off (if any) were ascertained to be worthless

If at any future time a debt charged off as worthless is collected the amount collected must be returned as income for the year in which received.

Capital debts are not deductible if made good by recovery of property sold or retention of property pledged.

5. (b) DEPRECIATION.

The [illegible] deductible on account of depreciation is an amount *charged off* which fairly represents the [illegible] during the year in the value of physical property by reason of exhaustion, wear, and tear. Such amount should be determined upon the basis of the *cost* of the property and the probable number of years constituting its life. Stocks, bonds, and like [illegible] [illegible] intangible assets, are not subject to exhaustion, wear, and tear and [illegible] [illegible] [illegible] any amount charged off as representing a [illegible] [illegible] deductible either as depreciation or as a loss.

Depreciation computed on [illegible] value of merchandise in stock is not an allowable deduction by reason of [illegible] unless since the merchandise is unsalable.

If deduction is made on account of depreciation, the following statement must be filled [illegible]

Kind of property.	Cost.	Probable life after acquirement.	Amount of depreciation charged off. This year.	Previous years.
			$	$
			$	$

If building, [illegible] [illegible] of which constructed.

5. (c) DEPLETION.

[illegible] contemplates a [illegible] to return [illegible] [illegible] or in excess of purchase prior to [illegible] 1909 [illegible] [illegible] to the extent [illegible] the market price [illegible] such [illegible] An allowance [illegible] on account of depletion [illegible] [illegible] [illegible] March 1, 1913, or the cost [illegible] to that date, of the product mined and sold during the year, and will be [illegible] in accordance with the rule set out in Articles 170 to 173, Regulations 33, Revised. The amount sought to be deducted as this [illegible] must be charged off on the books of the company.

Kind of property.	Cost [illegible] [illegible] March 1, 1913.	Fair [illegible] value as of March 1, 1913.	Amount of depletion charged off. This year.	Previous years.
	$	$	$	$

* Coal, iron, or [illegible]
† State how [illegible]

6. INTEREST PAID.

(a) The amount of interest deductible under (a) is the amount actually paid within the year on an amount of bonded or other indebtedness (except on indebtedness falling under c (5) or 6 (c)) all indebtedness incurred for the purchase of obligations or securities the income from which is exempt from income tax) not in excess of the paid-up capital stock outstanding at the close of the year, or if there is no capital stock, the entire amount of capital (including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is actually employed in the business, but does not include any borrowed capital or interest-bearing indebtedness.

(b) Interest paid [illegible] on deposits or on money received for investment and secured by interest-bearing [illegible] of indebtedness issued by a bank, banking association or [illegible] or [illegible] [illegible] is deductible in the entire amount so paid.

[illegible] or any part thereof, is wholly secured by collateral [illegible] [illegible] corporation in the corporation's ordinary [illegible] [illegible] the interest paid on an amount of such [illegible] [illegible] may be deducted.

[illegible] [illegible] is paid in the following form. Distinguish [illegible] [illegible] [illegible]

128 Cross-Examination

By Mr. Ellick:

Exhibit 1 (without the letter attached) was received through the United States mail without any accompanying letter; no one connected with the Internal Revenue Department of the United States government ever made any demand that a return be filed on that form; or that a return be made or filed upon a form additional to the returns that witness made for the company in July, August and September, 1917. In connection with the company's attorney, Mr. Ed P. Smith, witness was handling all tax matters for Updike Grain Company during the years 1917 and 1918; and made up the return jointly—witness never received any notice of any kind from the government that he was required to file a return in addition to the returns that he had filed in July, August and September, 1917 and the return he filed in January, 1918; nor did Updike Grain Company ever receive any such notice.

Witness handled and saw all of the correspondence that was had between the Internal Revenue Department of the government and the Updike Grain Company with respect to their returns.

Examination

By Mr. Blaisdell:

LUTHER C. SMITH, complainant's second witness, being duly sworn, testified that his occupation is now and since June 16, 1918, has been that of Internal Revenue agent; that during the month of October, 1918, witness made an examination of the books and records of Updike Grain Company at its office in the Grain Exchange Building, Omaha; that witness was furnished with forms 7894 which were transcripts of the returns for 1913, 1914, 1915 and 1916, and had instructions to include the year 1917 in his examination.

129 Witness was not furnished, prior to making this examination, with a copy or copies of any returns filed by Updike Grain Company for the year 1917; nor with a synopsis on form 7894 of any return filed by Updike Grain Company for the year 1917.

In making this examination witness was acting under the directions of John J. Gillin, Revenue Agent in charge of the Omaha division and in charge of revenue agents like witness.

Witness examined the books and records of Updike Grain Company for the year 1917 to determine its tax liability for

the year 1917 and did so determine it—witness means for the fiscal period ending June 30, 1917.

From his examination of the books of Updike Grain Company for the 11-month fiscal period ending June 30, 1917, witness determined that corporation's net taxable income for that period.

Referring to his original written report made by witness at the time of his examination and containing the figures made as the result of his examination, witness testified that the net taxable income of Updike Grain Company for the fiscal period ended June 30, 1917, was $2,174,330.64.

Witness' examination was made for the purpose of determining the tax liability of Updike Grain Company arising or imposed by the Revenue Act of October 3, 1917.

Based upon his examination, from what he found out at that time, witness determined the tax liability of Updike Grain Company for the fiscal year ended June 30, 1917, imposed by the Revenue Act of October 3, 1917, to be $373,911.54.

At that time witness prepared or made up returns to be signed by Updike Grain Company and personally presented these returns to "Nelson B. Updike, the President, and I believe to Mr. Roth, the Secretary." They said the corporation had been dissolved and there were no officers with authority to sign the returns. They did not sign them.

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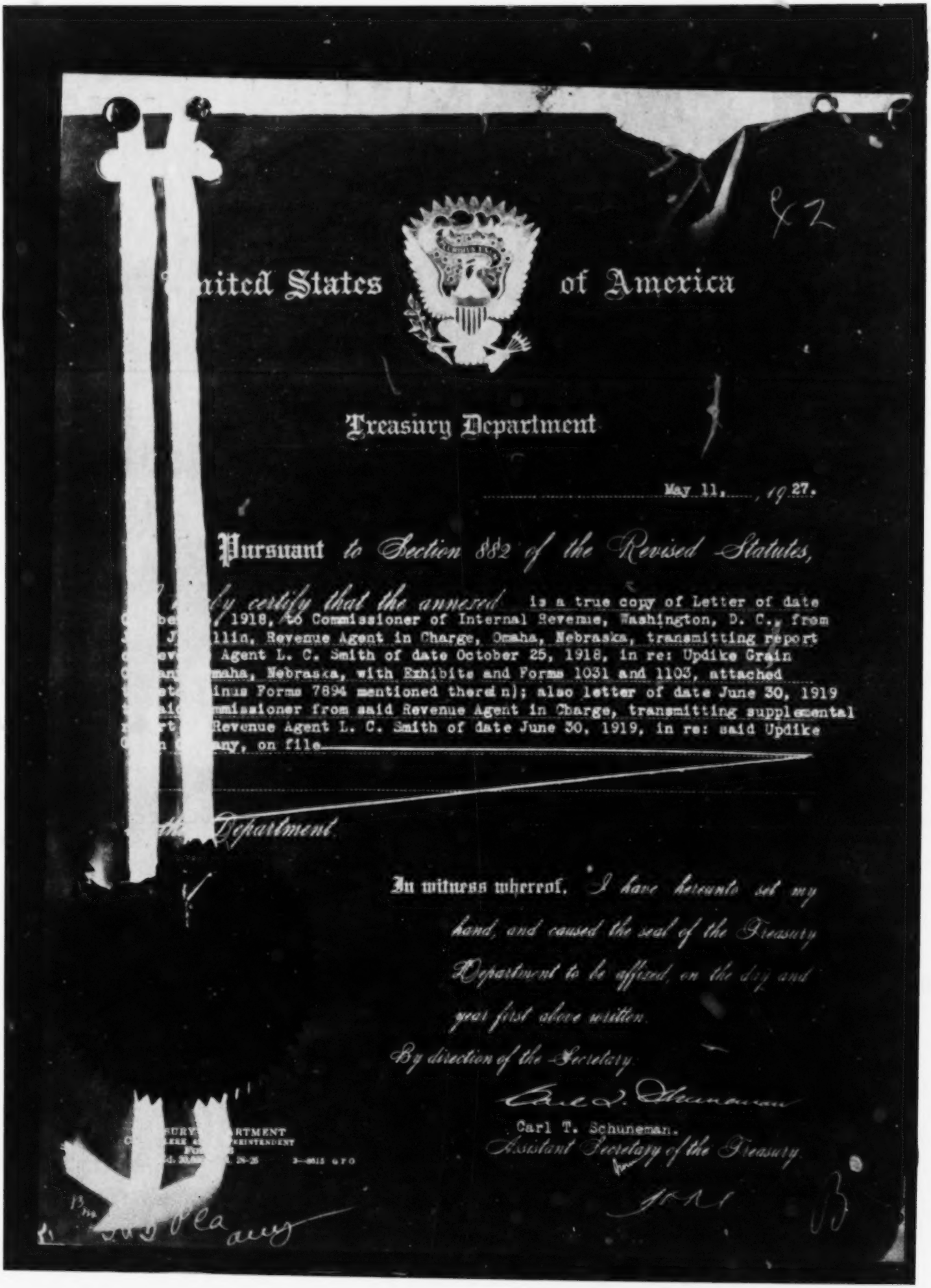
Asked whether they refused to sign them witness answered "Well, they refused in that way. They said they had no right to sign them".

Witness' attention was called to complainant's exhibit 2, being a certified photostatic copy of the Revenue Agent's report made by the witness, Luther C. Smith, and asked to examine particularly the copies of form 1031 and 1103 and state whether or not those are photostatic copies of blank forms of returns 1031 and 1103 which witness prepared in October, 1918, at the time of his examination of the books and records of Updike Grain Company and whether those are photostatic copies of the identical forms which witness presented to Mr. Updike and Gorton Roth, former officers of Updike Grain Company, for signature, to which witness answered "Yes sir, they are".

The court asked: "what is the date, about, when those were presented?", to which witness answered "October 25, 1918".

Exhibit 2 was offered and received in evidence without objections and is as follows:



United States of America

Treasury Department

May 11, 1927.

Pursuant to Section 882 of the Revised Statutes,

I hereby certify that the annexed is a true copy of Letter of date [illegible] 1918, to Commissioner of Internal Revenue, Washington, D. C., from J[illegible]llin, Revenue Agent in Charge, Omaha, Nebraska, transmitting report Agent L. C. Smith of date October 25, 1918, in re: Updike Grain [illegible]maha, Nebraska, with Exhibits and Forms 1031 and 1103, attached [illegible]inus Forms 7894 mentioned therein); also letter of date June 30, 1919 [illegible]mmissioner from said Revenue Agent in Charge, transmitting supplemental Revenue Agent L. C. Smith of date June 30, 1919, in re: said Updike [illegible]ny, on file

[illegible] Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary.

Carl T. Schuneman.

Assistant Secretary of the Treasury.

[illegible]RTMENT
[illegible]PERINTENDENT
28-25 3-8815 G70

7-30-19

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

Revenue Agents' Records Section
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OMAHA, NEBR. June 30, 1919.

Supplemental
CT: UPDIKE GRAIN CO., Omaha, Neb.

REC. JUL 11 1919

Commissioner of Internal Revenue,
Washington, D. C.

I am in receipt of the attached supplemental report from Revenue Agent L.C. Smith, dated June 30,1919, relative to his report dated October 28, 1918, correcting the computation of additional tax for fiscal year ended June 30,1917.

There appears to be due from this company, additional tax of $8,346.93 over that reported October 28,1918.

Copy of this report furnished Collector Loomis for the Nebraska District.

MJW:AU

Agent in Charge

Supplemental
1917
Original
Open
6-26-19

101

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR. June 30, 1919.

Supplemental

UPDIKE GRAIN CO. Omaha.

John S. Gillin, Esq.,
Revenue Agent in Charge
Omaha, Neb

Dear Sir:

With reference to my report dated October 25, 1918, relative to the tax liability of Updike Grain Co., Omaha, Neb., I have the honor to submit a supplemental report correcting the computation of additional tax for the fiscal year ended June 30,1917, (11 months period) as follows:

Net income revised,		$2,174,330.64
Less Excess profits tax		459,081.32
Amount subject to 2% tax		$1,715,249.32
Net income revised,		2,174,330.64
Less dividends $590,142.26		
" " 459,081.32	1,049,223.58	
Balance	1,125.107.06	
Subject to 4% tax,	613,694.75	
Excess profits tax		459,081.32
Tax at 2%		34,304.99
Tax at 4%		24,547.79
Total tax liability - - - - -		517,934.10
Total tax paid - - - - - -		
Income tax $47,439.94		
War prof tax, 96,582.62	144,022.56	
ADDITIONAL TAX - - - -	373,911.54	
" " previously repo	365,564.61	
ADDITIONAL TAX DUE,	8,346.93	

Respectfully,
L. C. Smith, Revenue Agent.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

OMAHA, NEBR. Oct. 26th, 1918.

OT MPT In re: [redacted]
Omaha, Nebraska.

JUL 1 1919

Hon. Daniel C. Roper,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

I am in receipt of the attached report from Revenue Agent L. C. Smith, dated Oct. 5, 1918, on the subject of his investigation of the returns of annual net income of the [redacted], Omaha, Nebraska, for the year 1916 to 1917, inclusive, and also invested capital and income subject to Excess Profits tax for 1917.

I respectfully recommend that this corporation be assessed additional tax for 1915, $95.81; for 1916, $3094.70; and for 1917, $365,564.61. Total $368,755.12.

Forms 7894 for the years 1915 to 1916, inclusive, unsigned Form 1031, unsigned Form 1103, copy of letter dated March 26, 1918, from Morton Both to the Collector, and balance sheets as of June 30, 1916, and June 30, 1917, are enclosed herewith.

Copy of this report, together with Excess Profits Tax report, furnished Collector Loomis, Omaha, Nebraska.

Respectfully,

[redacted]
Revenue Agent in Charge.

LJH:M

Encl.
Forms 7894 (4)
Form 1031
" 1103
Letter 3/26/18
Balance Sheets (2)

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

OMAHA, NEBR. Oct. 25th, 1918.

John J. Billin, Esq.,
Revenue Agent in Charge,
Omaha, Nebr.

Dear Sir:

With reference to attached Forms 7894 (Revised) showing returns of net income for the years 1913, 1914, 1915 and 1916, filed by the Updike Grain Co., Omaha, Nebr., I have the honor to report that I visited the office of that corporation and made an investigation of its returns for the years 1913 to 1917, inclusive, returns for prior years having been investigated, and found additional tax liability and refunds due as follows:

	Additional Tax	Refund Due
1913		$258.25
1914		113.01
1915	$95.81	
1916	3094.70	
1917	365564.61	
Totals	$368,755.12	$371.26

Net due 368,383.86

This company was incorporated under the laws of the State of Nebraska, Aug. 19, 1899, with a paid up common stock of $500,000. The common stock was increased in 1906 to $1,000,000.00 and in 1917 it was again increased to $2,000,000.00.

The company was dissolved on Aug. 28, 1917.

On account of the inadequate system of accounting kept by this company, it was impossible to make a complete verification of any return filed, but from all books and records available, it appeared that the full amount of gross income for each year was reported and no improper deductions taken.

ADJUSTMENTS

In May 1914 this company was granted permission to make returns on the basis of a fiscal year ending July 31. After July 1914 the books

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closed annually on June 30, but it continued to make returns for the fiscal year ending July 31, using the gross income and deductions shown by the book closing of June 30. To make the figures of the returns conform to the fiscal year designated, the following adjustments were required.

1913 - Amended Return

Item 3		$105,126.03
4	$45,939.42	
6a	10,062.55	
7	697.66	56,699.63
Net Income		48,426.40
" " reported		74,251.38
Excessive net income reported		25,824.98
Refund due		258.25

Differences:

The original return was for the period July 1, 1912, to July 1, 1913.

As the company had no permission at that time to render a return on the fiscal year basis, it was necessary to adjust the items of income and deductions, to the calendar year by deducting one half of the gross income and deductions reported, and adding the gross income and deductions from July 1 to Dec. 31, 1913.

Amended Return - Fiscal Year Ending July 31, 1914. (7 Months' Business)

Item 3		$38,918.16
4	$20,224.87	
6a	4,915.58	
7	593.67	25,734.12
Net Income		13,184.04
" " reported		24,484.64
Excessive net income reported		11,300.60
Refund due		113.01

Differences:

The original return was for the period July 1, 1913, to July 31, 1914, instead of for the 7 months ending July 31, 1914. It was necessary to adjust the gross income and deductions to this basis using 7/13 of the items reported.

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Amended Return Fiscal Year Ending July 31, 1915.

Item 3		$442,295.00
4a	$156,617.18	
b	4,650.00	
5a	318.17	
b	37,473.30	
6a	45,583.63	
7	5,103.33	251,745.61
Net Income		190,549.39
" " reported		180,968.70
Additional net income		9,580.69
Additional tax		95.81

Differences:

The original return was for the period July 31, 1914, to June 30, 1915. It was necessary to adjust the income and deductions to the fiscal years designated, by adding the income and deductions for July 1915, determined by taking 1/12 of the gross income and deductions of the fiscal year book closing for the period from June 30, 1915, to June 30, 1916.

Amended Return Fiscal Year ending July 31, 1916

Item 3		$609,459.54
4	$190,278.95	
5a	930.38	
6a	53,794.47	
7	6,401.71	246,405.51
Net Income		363,054.03
" " reported		174,968.30
Additional net income		188,085.73
Tax 1%		3,530.54
Addl. Tax 2%		2,117.82
Total tax liability		5,748.36
" " paid		2,653.66
Additional tax due		3,094.70

There appears to be an error in the computation of the additional assessment at 2% shown on the abstract of return for this year.

Differences:

The original return was for the period June 30, 1915 to June 30, 1916. It was necessary to adjust the gross income and deductions to the fiscal year designated, by deducting the income and deductions for July 1915 and adding that of July 1916, determined by taking 1/12 of the total gross income and deductions as shown by the book closings for the fiscal years ending June 30, 1916 and June 30, 1917.

Copy of Return Fiscal Year Ending June 30, 1917

Item 1		$2,000,000.00
2		1,009,671.91
3a	$2,036,898.56	
c	56,252.36	
d	643,791.55	
e	116,657.66	2,853,600.13
4a	375,466.58	
5a	1,277.06	
6a	98,202.35	
7	6,657.09	481,603.08
Net Income		$2,371,997.05
Tax @ 2%		47,439.94

Amended Return Fiscal Year Ending June 30, 1917.

Item 1		$2,000,000.00
2		1,012,771.91
3a	$1,867,157.01	
c	51,564.67	
d	590,142.26	
e	106,936.19	2,615,800.13
4	344,177.70	
5a	1,170.64	
6a	90,018.82	
7	6,102.33	441,469.49
Net Income		$2,174,330.64
Less Dividends (3d)		590,142.26
Income less dividends		1,584,188.38
6/11 - 1917 proportion		864,102.75
Less Excess Profits Tax		459,081.32
Taxable at 4%		405,021.43
Excess Profits Tax		459,081.32
Income Tax @ 2%		34,304.99
" " @ 4%		16,200.86
Total tax liability		509,587.17
Total Tax paid		
Income tax	$47,439.94	
Ex. Profits Tax	96,582.62	144,022.56
Additional tax due		$ 365,564.61

2% tax on net income for fiscal period less 11/12 1917 portion.
Differences:

The original return included the business from June 30, 1916, to June 30, 1917, as per book closings of those dates. The end of the fiscal year was redesignated as June 30, and the company given permission to make return on that basis, and the return should have included only eleven months's business from July 31, 1916, to June 30, 1917. It was necessary to adjust the gross income and deductions to that period by eliminating the income and deductions for July 1916, determined by taking 1/12 of the total gross income and deductions of the book closing for the period June 30,1916, to June 30, 1917.

Copy Final Return for Period June 30, 1917 to Aug. 28, 1917.

Item 1		$2,000,000.00
2		645,521.91
3		57,244.66
4	$79,815.92	
5a	11,772.80	
6a	7,610.43	
7	1,430.50	100,629.65
Net Income		None

The books show an operating loss for that period, as reported.

On Aug. 28, 1917, the corporation was dissolved and all assets distributed to the stockholders, and the business has since been run as The Updike Grain Company (not incorporated), N. B. Updike, Owner.

In reply to a letter from the Collector of Internal Revenue for Nebraska, asking for amended returns for the year 1917, the enclosed letter (Exhibit A) was directed to his office by Gorton Roth formerly Secretary of the Updike Grain Co.

Amended returns and claims for refund covering adjustments, shown by this report, for the years 1915 to 1917, inclusive, could not be secured, as it was stated by the former secretary of the company that there were no officers of the company to execute same.

Unsigned amended returns for the fiscal year (11 months) ending June 30, 1917, are enclosed herewith.

N. B. Updike, formerly President of the Updike Grain Co. was advised of the differences found and the amount of additional tax resulting therefrom. He stated that it would be necessary to collect the tax from the individual stockholders at the time the company was dissolved, as no provision was made for the payment of this tax before the assets were distributed.

I list of stockholders on Aug. 28, 1917, the date of dissolution is enclosed herewith. (Exhibit B)

Respectfully submitted,

(Sgd) L. C. Smith
Revenue Agent

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Re: UPDIKE GRAIN COMPANY, Rpt.....1
Omaha, Nebraska.

In addition to verification of income tax returns of the UPDIKE GRAIN COMPANY, Omaha, Nebr., I have the honor to report that I made a careful examination of the books and records of this company for the purpose of preparing an Excess Profits Tax Return on Form 1108, as required by the Act of Oct. 3, 1917, and found as follows:

EXCESS PROFITS TAX SUMMARY.

Tax liability under Act Oct. 3, 1917,	$459,081.32
Tax paid under Act of March 3, 1917,	96,583.62
Additional tax due, ...	$362,498.70

This company was incorporated under the laws of the State of Nebraska, Aug. 19, 1899, with a paid-up common stock of $500,000. The stock was increased in 1906 to $1,000,000. fully paid up and in April, 1917, to $2,000,000. by a $1,000,000 stock dividends paid out of 1917 fiscal year earnings.

Invested capital for pre-war years and taxable year consisted of fully paid up capital stock and earned surplus, due allowance having been made on the books of the company for depreciation and losses sustained from date of incorporation to taxable year:

Copy Excess Profits Tax Return on Form 1095 under Act March 3, 1917.

Item 1			$2,100,844.05
2			6 months
3			2,371,997.05
Deductions:			
11/12 of $5,000.00	$4,583.33		
11/12 of 8% capital,	$154,081.90		158,645.23
4			2,213,351.82
Less 5/11			1,006,069.01
5			1,207,282.81
6			.08
7 Tax liability.			96,582.62

Re: Updike Grain Company,
Omaha, Nebraska. EPT.....2

Return for Fiscal year (11 months) ending 6p30-17

SYNOPSIS OF AMENDED RETURN.

	Invested Capital.	Net Income
1911	$1,101,771.11	$58,358.72
1912	1,007,324.06	5,367.47
1913	1,131,334.89	None
Totals,	$3,240,430.06	$63,726.19
1917,11/12	933,740.81	$1,584,188.38

Percentage of pre-war earnings to invested capital, 2 plus %
Percentage used in computing deduction, 7%
7% of 11/12 of invested capital taxable year, $65,361.86
11/12 of Specific deduction, 2,750.00
Total deductions, $68,111.86

Computation of Tax.

15% ------	$140,081.12	$68,111.86	$ 71,948.26	20%	$14, 389.65
15 to 20% --	46,687.04		46,687.04	25%	11,671.76
20 to 25% --	46,687.04		46,687.04	35%	16,340.46
25 to 33% ---	74,699.26		74,699.26	45%	33,614.67
over 33%	1,276,053.92		1,276,053.92	60%	765,632.35
Total,	$1,584,188.38	$68,111.86	1,516,076.52		$841,649.09

6/11 of tax for period Jan. 1 to June 30, 1917, $ 459,081.32

Difference in invested Capital.

Invested Capital, 1917 reported,	$2,100,644.05
Invested capital, 1917, revised,	1,018,826.34
Difference,	$1,082,217.71

Invested capital reported included $1,000,000 stock dividends issued April 30, 1917, out of fiscal year 1917 earnings, $1,000,000.00

Invested capital reported included average amount of stock in other companies in excess of average indebtedness, 278,694.13
Total excess, $1,278,694.13

Less July 1916 earnings, not included in invested, capital reported, 197,698.41
Net difference, $1,082,217.71

Re: Updike Grain Company,
Omaha, Nebraska. EPT.....3

An unsigned amended return on Form 1103 is enclosed herewith, as there are no officers of the Updike Grain Company to sign same, the company having been dissolved August 28, 1917..

It was impossible to prepare an accurate balance sheet as of July 31, 1916, and the balance sheet of June 30, 1916 is submitted herewith. To the surplus and undivided profits shown therein, is added the earnings for July, 1916, and the total is used in computing the invested capital at the end of the fiscal year ending July 31, 1916. An accurate balance sheet of June 30, 1917, is also enclosed.

(Signed)

L. C. Smith,

Revenue Agent.

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STATEMENT OF UPDIKE GRAIN COMPANY, at close of business, 6-30-17

Resources,		Liabilities,	
Cash on hand,	$3,593,255.75	Capital Stock,	$2,000,000.00
Grain on Hand and in Transit,	193,714.60	Surplus and Undivided profits,	192,721.60
Liberty Bonds,	150,000.00	Accts. Payable,	231.56
Board of Trade Memberships,	17,325.00	Bills Payable,	1,012,771.91
Bills Receivable,	59,454.68		
Accts Receivable,	480.00		
Elevators, plants, real estate, cribs, lumber & coal buildings, including terminal elevator at Lincoln, Neb.,	193,485.04		
	$3,205,715.07		$3,205,715.07

W.B. UPDIKE, President.

GORTON ROTH, Secretary.

E. A. COPE, Treasurer.

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STATEMENT OF UPDIKE GRAIN COMPANY, at close of business, 6-30-16.

Resources,		Liabilities	
Cash on hand,	$520,734.02	Capital Stock,	$1,000,000.00
Grain on Hand and in transit,	69,421.12	Surplus & undivided profits, - -	100,844.05
Stocks, - - -	581,030.00	Accounts Payable,	1,142.09
Board of Trade Memberships,	14,550.00	Bills payable,	315,907.99
Bills Receivable,	38,575.00		
Accts Receivable,	525.00		
Elevators, plants, real estate & coal buildings, including terminal elevator at Lincoln, Neb.	193,058.99		
	$1,417,894.13		$1,417,894.13

W. B. UPDIKE, President,

C. L. BABCOCK, Secretary,

W. A. COPE, Treasurer.

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(Exhibit A.)

Copy

Omaha, Nebr. March 26, 1918.

To the Collector of Internal Revenue,
For the District of Nebraska,
Omaha, Nebr.

Dear Sir:

The Updike Grain Company was organized under the laws of the State of Nebraska August 21, 1899 and did business up to August 27, 1917, on which date the Company was duly dissolved in pursuance of the laws of the State of Nebraska, and since said date the said corporation has not been in existence. Prior to the dissolution of said Company in pursuance of Article 85 of the Income Tax Regulations, then in full force and effect as supplemented by ruling of the Acting Commissioner of Internal Revenue under date of March 22nd, 1917, the said corporation retained from its assets and paid Federal Income Tax and excess profits tax for the fractional part of the year 1917, such payments being made in pursuance of the final and fiscal returns duly made and filed in accordance with said rulings.

Prior to the said dissolution of said corporation all of the indebtedness of the said corporation was liquidated and paid in full, and at the time of said dissolution the said corporation had no indebtedness whatsoever outstanding or unpaid and had no creditors.

At the time of said dissolution a final distribution of all of the assets of said corporation was made, and all of said assets were paid as a final dividend to stockholders, such payment being made in accordance with the law of the State of Nebraska. Since said payment the said corporation has not been in existence, nor is there in existence any money or other property of said corporation, nor are there any officers, directors or stockholders.

I am addressing this communication to you because I held the position of Secretary of said corporation prior to its dissolution, and because I am aware of regulation known as Article 61 of the regulations in reference to the Income Tax Act of October 3rd, 1917 (but which I am advised is erroneous), and in order that a statement of the facts in this matter may be made for your records.

Yours truly,

Reg 33 (Revised)
Art. 61.

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(Exhibit B)

HOLDERS OF COMMON STOCK OF THE UPDIKE GRAIN COMPANY
August 28, 1917.

E. B. Updike	5667	Office
Edith E. Updike	4080	2614 Jackson St. Omaha.
Edward Updike	2940	Office
E. B. Updike	892	Office
Jay M. Haehler	500	373 Broadway, Milwaukee, Wis.
Hazel Updike	400	2614 Jackson St., Omaha
E. B. Updike, Jr.	400	2614 Jackson St., Omaha
Charles Howe	400	530 Postal Tele. Bldg., Chicago
Gerson Roth	400	Office
Eva Y. Roth	400	Office
O. M. Smith	364	Office
Mrs. J. L. Babcock	320	Pecatonica, Ill.
F.H. Lichton	250	373 Broadway, Milwaukee, Wis.
P.H. Updike	230	960 Arapahoe St. Los Angeles, Cal.
Ed. P. Smith	200	Office
Geo. A. Roberts	200	Omaha Grain Exchange Bldg., Omaha
C. Arthur Howe	175	530 Postal Tele. Bldg., Chicago
F. L. Babcock	162	Pecatonica, Ill.
F. O. Goodwill	160	Pecatonica, Ill.
F. B. Johnson	132	c/o Omaha Printing Co., Omaha.
M. M. Betzner	110	c/o CMSW Ry. Co., Sioux City, Iowa
Thomas Wolfe	100	David City, Nebr.
A. Pickens	100	Hastings, Nebr.
F. J. Thatcher	100	530 Postal Telegraph Bldg., Chicago
Frank L. Wood	100	373 Broadway, Milwaukee, Wis.
L. W. Schreiber	84	Office.
F. A. Howard	81	Office.
L. Claude Hamilton	78	4827 Dodge St. Omaha.
Mary S. Updike	73	2612 Parson St. Omaha.
J. B. Hill	72	Hopewell, N. J.
C. J. Smyth	50	Omaha Nat. Bk Bldg., Omaha.
Frank R. O'Neill	50	R. F. D. #2, Benson, Nebr.
Theodore M. Grow	50	Office
Henry Figard	40	Seward, Nebr.
Bertha M. Hanke	40	c/o Corn Exchange Bk., 72nd St. & Columbus Ave., New York, N. Y.
J. Harvey Stout	30	Hopewell, N. J.
Jo. Hamilton	28	4827 Dodge St., Omaha.
Agnes Johnson	21	2929 Frederick St., Omaha.
Georgia E. Babcock	20	117 Ruby Ave. Colorado City, Colo
B. E. Sloat	20	Harvard, Nebr.
Alex L. Hart	20	Sawyer, Nebr.
Charles Figard	20	Thedford, Nebr.
Charles Zinkey	20	Seward, Nebr.
Isabelle Thorpe	20	2146 S 35rd St. Omaha.
Mrs. Nellie Goodwill	20	Pecatonica, Ill.
Hattie B. Updike	20	960 Arapahoe St., Los Angeles, Cal
Winifred S. Updike	20	128 S 35th St., Omaha.
George Loff	20	c/o Standard Timber Co. Evanston,
J. A. Pickinson	20	P. O. Box 1287, Lincoln, Nebr.
F. C. Bell	20	Office
Mrs. A. E. Merriam	18	18 Hazlett St., cor. S. Boston Way
E. S. Carvey	10	Bridgeport, Nebr.
Lawrence E. Updike	10	960 Arapahoe St., Los Angeles, Cal
Marjorie D. Updike	10	960 Arapahoe St., Los Angeles, Cal
H. E. Miller	10	Office
A. . Murtagh	5	5164 Cass St., Omaha.
S. A. Tobey	5	Gresham, Nebr.
Lucy Updike	4	4908 Davenport St., Omaha.
Grace E. Babcock	4	Pecatonica, Ill.
Victoria Samuels	4	336 S 13th St. Lincoln, Nebr.
Clara McCardel	4	Office
J. E. Murtagh	4	5164 Cass St., Omaha.
Edward A. Duell	2	R. F. D. #3 Wilber, Nebr.
Mary Louise Jackson	2	Lawrenceville, N. J.
	20000	

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CAUTION

Read this form and all instructions carefully and fill in supplementary statement on back of return first. Totals in supplementary statement must agree with totals on face of return.

Form 1031 (Revised January, 1918)—UNITED STATES INTERNAL REVENUE

CORPORATION INCOME TAX RETURN

(FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES)

(11 Months)

Return of annual net income for the { calendar year 1917 / fiscal year ended June 30, 1917

(This and write in this space.) RECEIVED

1917

Month | Page | Line

Audited by

Name of corporation Updike Grain Co

Principal office Omaha Neb

Kind of business carried on Grain Date of organization Aug 19 1899

1. Total amount of paid-up capital stock outstanding at the close of the year, or if there is no capital stock the capital other than interest-bearing indebtedness employed in the business at the close of the year. Unissued or treasury stock must not be included in this item, but only stock actually issued and outstanding at the close of the year for which this return is made.

(a) Paid-up "common stock"	$ 1 200 000 00
(b) Paid-up "preferred stock"	
Total paid-up stock	$
or (c) Capital employed in business	$ 2 000 000 00

2. Total amount of bonded or other interest-bearing indebtedness outstanding at the close of the year, exclusive of indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company and exclusive also of indebtedness incurred in the purchase of securities, the income from which is not subject to income tax.

Character of obligation.	Rate of interest.	Principal.
Bills Pay		$ 1 012 291 91
Total indebtedness		$

INCOME.		DEDUCTIONS. (See corresponding items on back of return.)	
3. (a) Gross sales and other income from operations	$ 26 495 952 78	4. (a) Cost of goods and other property sold	$ 24 629 795 97
(b) Income from rentals, royalties, etc.		(b) Expenses, general	244 [illegible] 90
(c) Income from interest (see item 3c on back of return)	51 564 67	5. (a) Losses sustained charged off	1 170 67
(d) Income from dividends (see item 3d on back of return)	590 172 26	(b) Depreciation charged off	
(e) Income from all other sources (see item 3e on back)	106 936 19	(c) Depletion charged off	
Total gross sales and other income	27 244 595 40	6. (a) Interest paid (except as entered under (b) and (c))	90 018 87
Less total deductions	25 470 265 26	(b) Interest paid on deposits (for banks only)	
8. Total net income	2 174 330 64	(c) Interest paid on indebtedness wholly secured by collateral	
Less: (a) Excess profits tax (item 12) $ 439 091 32		7. (a) Domestic taxes paid, not including income and excess profits taxes	61 02 33 1
(b) Dividends received out of earnings of 1913, 1914, 1915 $		(b) Foreign taxes paid	
Total (a plus b)	459 081 32	Total deductions	25 470 265 26
9. (a) Amount taxable at 2% (item 8 less total of a plus b)	1 715 249 32		
(b) Amount taxable at 1% (item 10)			
10. Amount of total net income $ 2 174 330 64		TAX	
Less: (a) Excess profits tax (item 12) $ 439,249.09		12. Amount of excess profits tax (see instructions below)	439 091 32
(b) Dividends received (items 5d, 6 $ 590,172.26		13. Amount of 2% tax (2% of item 9a)	34 304 99
Total (a plus b)	1 431 791 35	14. Amount of 1% tax (1% of item 9b)	
11. Amount taxable at 4% (item 10 less total of a plus b)	742 539 29	15. Amount of 4% tax (4% of item 11)	16 200 66
If return is made for a full fiscal year ended in 1917, compute tax on as many twelfths of item 11 as there are months from January 1, 1917, to the close of the fiscal year. Enter amount taxable here	6/11 405 021 43	16. Total tax assessable	509 517 97

We, the undersigned, president and treasurer of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me } this _____ day of _____, 19____

State of (Where taking affidavit.)

_____ President.

_____ (Official capacity.)

_____ Treasurer.

GENERAL INSTRUCTIONS.

Excess profits tax.—For the purpose of the excess profits tax, every corporation subject to income tax shall be deemed to be engaged in business, and all the income and business in which it is engaged (whether continuously carried on or not) shall be treated as a single trade or business, and all its income from whatever source derived shall be considered to be received from such trade or business.

In the case of a trade or business having no invested capital or not more than a nominal capital, the excess profits tax is equivalent to 8 per cent of the net income in excess of $5,000. This tax applies primarily to corporations engaged principally in rendering personal service in which the employment of capital is not necessary and the earnings of which are to be ascribed primarily to the activities of the owners.

In the case of a trade or business having more than a nominal invested capital, the excess profits tax is equal to various percentages of the net income, depending on its ratio to the invested capital. Every corporation having a net income of over $5,000 for the taxable year must make a return of invested capital and compute the amount of tax. Form 1088.

For further instructions see Regulations No. 41, Relative to the War Excess Profits Tax. A copy can be obtained from any collector of internal revenue.

Time of filing returns.—Returns made on the basis of a calendar year must be filed on or before March 1 with the collector of internal revenue of the district in which is located the principal place of business of the corporation; if made on the basis of a FISCAL YEAR, they must be filed within 60 days after the close of such year.

Fiscal year.—Corporations desiring to make returns of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to March 1 of the year in which the return would be due if made on the calendar year basis, file with the collector a notice in writing designating the last day of some month as the close of each fiscal year. A return for that portion of the calendar year ending with the date designated as the close of the fiscal year must be filed on or before the last day of March of the same calendar year, and the return for each full fiscal year thereafter must be filed within 60 days after the closing date of the fiscal year so established.

Extension of time.—In the case of neglect to file the return within the prescribed time, the collector is authorized to grant an extension of the filing period not exceeding 30 days from the normal due date, provided such neglect was due to absence or sickness and provided an application for such extension is made in writing prior to the expiration of the period for which extension may be granted. In meritorious cases the Commissioner is authorized to grant such further extension as he may deem proper.

Signatures and verification.—Returns must be signed and verified by two officers of the corporation, that is, by the president, vice president, or other principal officer, and the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Subsidiary companies.—The corporation making this return must attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. Each subsidiary company must make a separate and distinct return.

Foreign corporations.—Foreign corporations subject to the law are required to make returns to the collector of the district in which is located the principal place of business or agency through which is transacted the business in the United States, or if the corporation has no place of business or agency in the United States, the return will be filed with the collector of internal revenue at Baltimore, Maryland. The gross income to be returned is that received from business transacted and capital invested in the United States, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including income derived from dividends on capital stock or from net earnings of indirect corporations, joint-stock companies, or associations whose net income is taxable under this law. The deductions allowable are those losses and disbursements incidental to and necessary in the transaction of the business in this country, all as specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business done or capital invested in the United States. If a foreign corporation has no place of business or agency in the United States and no return is made, the tax on income from interest and dividends will be withheld at the source.

Penalties.—Corporations refusing or neglecting to file returns within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding $10,000, and an additional tax of 50 per cent in case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return, shall be added to the assessment; provided, in case of delinquency, if the return is voluntarily filed without notice from the collector, and it is shown that delay in filing was due to reasonable cause and not to willful neglect, the 50 per cent additional tax will not be assessed. A statement of the cause of delay must be attached to each delayed return.

Any officer or any corporation required by law to make, render, sign, or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

SUPPLEMENTARY STATEMENT

The following information must be furnished, either on this sheet or on attached schedules, by every corporation, joint-stock company, or association. Without such information the return will not be accepted as complete. The items below relate to the correspondingly numbered items on the first page.

2. (a) FROM INTEREST.

Interest to be reported as income for the purpose of the income tax includes all interest received on bonds or securities owned by the corporation except interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions.

2. (d) FROM DIVIDENDS RECEIVED.

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned (under Item 2 (d) on front page of this form) by the receiving corporation as income of the year in which the distribution was made or ordered to be made and will be taxed at the rates prescribed by law for the years in which surplus or profits distributed were earned, viz, 1% on amounts received out of earnings of 1913 (subsequent to March 1, 1913), 1914, and 1915, and 2% on amounts received from earnings of 1916 and 1917. A statement from the corporation paying the dividends included herein should be attached to this return, showing separately the amount of dividends paid out of earnings of each year; otherwise, they will be deemed to have been paid out of the earnings of 1917 and will be taxed 2%. The receiving corporation, in order that tax may be computed on dividends received in 1917 at the rates applicable to the years in which the profits were earned, must fill in the following form:

Dividends received in 1917 out of profits accrued each year subsequent to March 1, 1913.

1913	1914	1915	1916	1917	Total.
$	$	$	$	$	$

2. (e) FROM OTHER SOURCES.

Income received from all sources not elsewhere specified should be itemized below:

		$			
Total		$			

4. (a) COST OF GOODS AND OTHER PROPERTY SOLD.

Report the cost of goods sold in the following form:

Merchandise bought for sale		$		
Cost of manufacturing or otherwise producing goods (if separately shown on books). (Submit schedule showing principal items of cost.)				
Plus inventories at beginning of year				
Total		$		
Less inventories at end of year				
Net cost of goods sold		$		

Explanations

If the corporation makes inventories of merchandise or materials, explain the basis on which they are made, whether (a) at cost, or (b) at cost or market value, whichever is lower. If no inventories are made, write no entries referring to inventories, but report the total cost of goods purchased or produced during the year. If the cost of manufacturing or otherwise producing goods is not kept separate from general expenses in the corporation's accounts, the ordinary cost items (labor, material, general) below.

Corporations dealing in real estate, and any corporation that has sold any of its capital assets during the taxable year, should report the cost of the property sold in the following form:

1. Original cost of property ..... $
2. Market value March 1, 1913, if acquired before that date .....
3. Cost of subsequent improvements, if any .....
4. Depreciation and depletion to date of sale .....
5. Net cost (item 1 or item 2 plus item 3 minus item 4) .....

State how market value March 1, 1913, was determined .....

Does such value include any good will? If so, how much? $ .....

4. (b) EXPENSES, GENERAL.

This item should include only the ordinary and necessary expenses paid within the year in the operation of the business and maintenance of the properties of the corporation, itemized as per schedule below. **It must not include any expenditures reported under 4 (a), 5, 6, or 7.**

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation allowances.

Payments made to officers or employees, who are stockholders, in the guise of salaries or compensation, the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

1. Salaries of officers		$			
Salary, wages, commissions, etc. (not included in "Cost of manufacturing or otherwise producing goods" under 4 (a))					
2. Rents, royalties, and other payments in lieu of rent					
3. Repairs, ordinary and incidental					
4. Other expenditures (classify):					
Total expense		$			

If salaries were increased or extra compensation was paid to officers, state the amount, the reason therefor, and the basis on which computed.

5. (a) LOSSES.

Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear, and tear. The losses, not compensated by insurance or otherwise, must be absolute, complete, actually sustained during the year, and charged off on the books of the corporation.

Kind of property on which loss is claimed.	Cost of property.	Cause of loss.	Amount charged off within year.		
	$		$		
Total			$		

When were the deducted losses ascertained to be such? .....

How were they so ascertained? .....

The cost of property lost should be determined as indicated in Item 4 (a).

A bad debt charging thereon accrued since January 1, 1909, will not be allowed as a deduction unless the amount was reported as income for the year in which the debt was created.

State how the debts charged off (if any) were ascertained to be worthless .....

If at any future time a debt charged off as worthless is collected the amount collected must be returned as income for the year in which received.

Unpaid debts are not deductible if made good by recovery of property sold or securities of property pledged.

5. (b) DEPRECIATION.

The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear, and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds, and like securities, as well as any other intangible assets, are not subject to exhaustion, wear, and tear within the meaning of the law. Hence any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or as a loss.

Depreciation computed on total foreign value of merchandise in stock is not an allowable deduction by reason of damage or deterioration the merchandise is unsalable.

If a deduction is made on account of depreciation, the following statement must be filled in:

Kind of property.	Its cost.	Probable life after readjustment.	Amount of depreciation charged off.	
			This year.	Previous years.
	$		$	$
Totals	$		$	$

If building, state under "Kind of property" the material of which constructed.

5. (c) DEPLETION.

Depletion applies to the extraction of natural deposits, and contemplates a deduction in return to the corporation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market price or value of such deposits as of that date. An allowable deduction on account of depletion must not exceed the fair market value as of March 1, 1913, or the cost subsequent to that date, of the product mined and sold during the year, and will be determined in accordance with the rule set out in Articles 179 to 173, Regulations 33, Revised. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property.	Its cost Recorded (depreciation to March 1, 1913.	†Fair market value as of March 1, 1913.	Amount of depletion charged off.	
			This year.	Previous years.
	$	$	$	$

* Cost, from any source, of ore.
† Where how fair market value as of March 1, 1913, was determined.

6. INTEREST PAID.

(a) The amount of interest deductible under (c) is the amount actually paid within the year on an amount of bonded or other indebtedness (except on indebtedness falling under 6 (b) or 6 (c) and indebtedness incurred for the purpose of obligations or securities the income from which is exempt from income tax) not in excess of the sum of the paid-in stock outstanding at the close of the year, or if there is no stock, the paid-up or assessed amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, comprehends the entire capital paid in by the members of the company, including so much of the accumulated surplus as is actually employed in the business, but does not include any borrowed capital or interest-bearing indebtedness.

(b) Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, or loan or trust company is deductible in the entire amount so paid.

(c) If the corporation's indebtedness, or any part thereof, is wholly secured by collateral which is the subject of sale or hypothecation in the corporation's ordinary business as a dealer in such property, the interest paid on an amount of such indebtedness not exceeding the actual value of the collateral may be deducted.

Describe all obligations on which interest is paid in the following form. Distinguish plainly collateral loans falling under 6 (c) and also obligations incurred for the purchase of securities, the income from which is exempt from income tax.

Kind of obligation.	Amount of principal.		Rate of interest.	Amount of interest paid.	
	$			$	
Total	$			$	

7. (a) TAXES PAID.

Taxes, paid or accrued on the books of the corporation during the taxable year, are deductible with the following exceptions: Federal income and excess profits taxes (including taxes paid on the interest on its own obligations in pursuance of a contract entered into therein relieving the holder of liability for such taxes), foreign taxes on income derived from sources within the United States by foreign corporations, local taxes specially assessed against property on account of benefits derived from public improvements or betterments, and taxes upon the corporation's capital stock in the hands of the stockholders.

BASIS OF RETURN.

Is this return made on the basis of actual receipts and disbursements? .....

If not, describe fully what other basis or method was used in computing net income .....

UNDISTRIBUTED INCOME, SURPLUS, AND UNDIVIDED PROFITS.

Total net income of taxable year preceding that for which this return is made (less income tax paid thereon)	$
Amount of such income remaining undistributed six months after the close of that year	
Amount of such income remaining undistributed twelve months after the close of that year	
Total surplus and undivided profits at close of taxable year	

If sufficient space is not provided for the entry of any information required in the "Supplementary Statement," schedules in the form indicated, marked with the number of the item to be explained, should be attached to this form.

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REVISED AUDITED

FORM 1120—UNITED STATES INTERNAL REVENUE.

CAUTION

Read all instructions.

Answer all questions.

If necessary, ask your Collector of Internal Revenue for assistance.

CORPORATION EXCESS PROFITS TAX RETURN

11 Mos Ending June 30. 1917

Taxable year ended _____, 191

(Do not write in this space.)
RECEIVED

LIST.
Month. | Page. | Line.

Audited by

Name Updike Grain Co.

Business address 623 Grain Exchange Bldg Omaha Neb

Kind of business Grain

Date established Aug. 1899

GENERAL INSTRUCTIONS.

1. Complete instructions.—For complete instructions concerning the filing of this form see Regulations No. 41 relative to the War Excess Profits Taxes imposed by the War Revenue Act approved October 3, 1917, referred to hereinafter as Excess Profits Tax Regulations. Copies can be obtained from any collector of internal revenue.

2. Who must make a return on Form 1103.—Every corporation having for the taxable year a net income of $3,000 or more (see Form 1031) must make a return on this form of its average invested capital during the taxable year and compute the amount of its excess profits tax, if any, as directed herein.

This return should be made at the same time and in the same manner as the return of net income for the taxable year on Form 1031.

A corporation which claims that it employs in its business only a nominal capital or that it can not satisfactorily determine the amount of its invested capital must, nevertheless, fill this form as far as practicable in order to show the facts necessary for action on its claim.

3. Taxable year.—The taxable year is the calendar year 1917 or (if the fiscal year of the corporation differs from the calendar year) the fiscal year ending in the calendar year 1917. A corporation whose fiscal year differs from the calendar year may also use this form for its return (without entries for prewar period) covering the fiscal year ending in 1918.

4. Taxable income.—All the income of a corporation from whatever source derived is deemed to be derived from its business and all such income subject to the income tax is also subject to the excess profits tax except as provided for in Schedule I.

5. Deduction.—Each corporation whose income (derived from a business carried on with invested capital) is subject to excess profits tax may deduct from the amount of its taxable income (1) an amount equal to not less than 7 per cent and not more than 9 per cent of the amount of its invested capital, as explained below, and (2) $3,000.

If the corporation was not in existence during the whole of at least one of the calendar years 1911, 1912, and 1913, designated by the act of October 3, 1917, as the prewar period, and has not succeeded to the control of a business which was carried on during any one or more of those years, the first deduction is an amount equal to 8 per cent of the amount of invested capital. Otherwise the deduction is an amount equal to the same percentage of the invested capital for the taxable year as the average net income during the prewar period was of the average invested capital during that period, provided that if such percentage is less than 7 per cent, the deduction shall be computed at the rate of 7 per cent and if more than 9, at the rate of 9 per cent (see Excess Profits Tax Regulations, Article 21).

In order to take advantage of this provision, the corporation must make a return of invested capital during the prewar period as well as during the taxable year. Space for such a return is provided on this form.

If the corporation prefers, it may compute the deduction at the rate of 7 per cent and avoid the necessity of rendering a return of invested capital for the prewar period. In any case the average amount of invested capital during the taxable year must be determined if possible.

6. Invested capital.—For definition of "invested capital" and complete instructions for computing its amount see Excess Profits Tax Regulations, Articles 42 to 69.

7. Computation of tax for fiscal year, part of which falls in the calendar year 1917.—The tax of a corporation whose fiscal year differs from the calendar year shall be that proportion of the tax computed on the net income for the fiscal year which the number of months from January 1, 1917, to the end of the fiscal year bears to the entire number of months in the fiscal year.

8. Corporations making claim for assessment under Article 58 of the Regulations (section 210 of the act of October 3, 1917) should answer all questions and fill all schedules so far as possible and attach a statement explaining why it is impracticable or in the case of foreign corporations, unreasonably expensive to fill out the entire return.

SCHEDULE I.—NET INCOME FOR TAXABLE YEAR SUBJECT TO EXCESS PROFITS TAX.

1. Net income for taxable year shown in Item 8, Form 1031		$ 2 174 330 67
2. Plus interest on obligations of the United States issued since September 24, 1917, held by corporation in excess of $5,000 par value		none
3. Total		$ 2 174 330 67
4. Less interest on obligations of the United States issued prior to September 24, 1917, included in Item 1	$ 590 142 26	
5. (a) Interest paid (not in excess of legal limit) on indebtedness incurred for purchase of obligations reported in Item 2, above		
6. Net income subject to excess profits tax		$ 1 584 188 41

SCHEDULE II.—INVESTED CAPITAL.

Item.	1911	1912	1913	Taxable year.
1. Capital, surplus, and undivided profits at the close of the preceding year as shown by corporation's books before making any adjustments therein (from Schedule A)	$ 1 101 771 11	$ 1 075 724 06	$ 1 131 334 89	$ 1 298 510 46
2. Adjustments by way of additions (from Schedule B)				
3. Total	$ 1 101 771 11	$ 1 075 724 06	$ 1 131 334 89	$ 1 298 510 46
4. Adjustments by way of deductions (from Schedule C)		68 400 00		279 884 12
5. Invested capital at beginning of year (Item 3 less Item 4)	$ 1 101 771 11	$ 1 007 324 06	$ 1 131 334 89	$ 1 018 626 34
6. Changes in invested capital during year (from Schedules D and E)				
7. Invested capital for year	$ 1 101 771 11	$ 1 007 324 06	$ 1 131 334 89	$ 1 018 626 34
8. Total invested capital for prewar period				$ 3 140 733 06

SCHEDULE III.—DEDUCTION. 1/2 Invested Capital (7%) $ 983,740.81

1. Percentage—net income to invested capital for prewar period. (Item 6, Schedule F, divided by Item 8, Schedule II. Carry out result as far as desired, but drop the remainder, if any, without increasing the last figure of the percentage		24 %
2. Percentage to be used in computing deduction (see Instruction 5)		7 %
3. Amount of deduction computed at above rate on invested capital for taxable year 7% of $ 933,740.81		$ 65 361 86
4. Exemption (except for foreign corporations) 1/2 of 3000.00		2 750 00
Total deduction		$ 68 111 86

SCHEDULE IV.—COMPUTATION OF TAX.

Classes of income for computation of tax. Over—	But not over—	Amount of income in each class.	Deduction (if in excess of 15 per cent of invested capital, enter only 15 per cent on first line and balance on line or lines below).	Balance subject to tax.	Rate.	Amount of tax.
$0.00	15 % of invested capital	$ 140 061 12	$ 68 111 86	$ 71 949 26	20 %	$ 14 389 85
15 % of invested capital	20 % of invested capital	46 687 04		46 687 04	25 %	11 671 76
20 % of invested capital	25 % of invested capital	46 687 04		46 687 04	35 %	16 340 76
25 % of invested capital	33 % of invested capital	74 699 26		74 699 26	45 %	33 614 67
33 % of invested capital		1 276 053 92		1 276 053 92	60 %	765 632 35
Total		$ 1 534 188 38	$ 68 111 86	$ 1 516 076 52		$ 841 649 07

6/11 of Total $ 459,081.32

SCHEDULE A.—CAPITAL, SURPLUS, AND UNDIVIDED PROFITS AS SHOWN BY BOOKS BEFORE MAKING ANY ADJUSTMENTS THEREIN.

A1. Stock actually outstanding (not in the corporation treasury) at the end of the preceding taxable year may be counted as invested capital to the extent that it is paid up.

A2. Reserves consisting of amounts not deductible in the computation of net income under the income tax law, may, if properly explained, be included as part of the surplus for the purpose of computing the invested capital.

ITEM	1911	1912	1913	TAXABLE YEAR
Capital stock paid up and actually outstanding at the close of the preceding year (not including treasury stock):				
1. First preferred	$ 41900 00	$ 41900 00	$ 41900 00	$
2. Second preferred				
3. Common	1000000 00	1000000 00	1000000 00	1000000 00
4. Total	$ 1041900 00	$ 1041900 00	$ 1041900 00	$ 1000000 00
Surplus and undivided profits:				
5. Paid-in surplus				
6. Earned surplus	59871 11	33824 06	89433 89	298510 46
7. Undivided profits				
8. GRAND TOTAL OF ITEMS 4, 5, 6, AND 7	$ 1101771 11	$ 1075724 06	$ 1131333 89	$ 1298510 46

SCHEDULE B.—ADJUSTMENTS BY WAY OF ADDITIONS.

B1. If any part of the interest on the corporation's permanent indebtedness was excluded as a deduction from the corporation's income for any year (see Form 1031), a proportionate part of such indebtedness may be added to invested capital for that year as Item 1, Schedule B.

B2. If any addition to invested capital is reported in Item 2, Schedule B, submit a full statement showing the kind of property, the date when paid in, its value on that date, and how the value was determined.

B3. If an addition to invested capital is reported in Item 3, Schedule B, submit a statement showing the kind of property, its cost, and the year in which it was acquired.

B4. If any addition to invested capital is reported in Item 4, Schedule B, state specifically the amount of depreciation or depletion written off each year in the books of the company and the amount allowed as a deduction in computing taxable income.

ITEM.	1911	1912	1913	TAXABLE YEAR
1. Proportion of permanent indebtedness, the interest on which is not deductible from income in computing income tax (Article 44)	$	$	$	$
2. Value of tangible property in excess of par value of stock issued therefor (Article 61)				
3. Additions to capital account allowable under Article 54	None			
4. Depreciation charged in accounts of corporation but disallowed by Treasury Department as expense on income tax returns				
5.				
6.				
7. Total	$	$	$	$

SCHEDULE C.—ADJUSTMENTS BY WAY OF DEDUCTIONS.

C1. Is any good will, trade-mark, trade brand, franchise, or similar intangible property, entered on the books of the corporation at a value in excess of its [illegible] per [illegible] In excess of [illegible] value of the stock issued therefor?

[illegible] cases (in the aggregate) of 20 per cent of the par value of the stock outstanding on March 3, 1913? No

If so, submit a statement showing (a) date of acquisition, (b) cash value at that date, (c) par value of stock issued therefor, (d) par value of total stock outstanding on March 3, 1913, and (e) value at which the assets are entered on the books of the corporation.

The amount by which "c" exceeds "b," "d," or 20 per cent of "d," whichever is lowest, must be entered as Item 1, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C2. Is any patent or copyright, paid in for stock, entered on the books of the corporation at a value in excess of its actual cash value when paid in? No In excess of the par value of the stock issued therefor?

If so, submit a statement showing (a) date of acquisition, (b) cash value of the patent or copyright at that date, (c) par value of the stock issued therefor, and (d) value at which the patent or copyright is entered on the books of the corporation.

The amount by which "d" exceeds "b" or "c," whichever is the lower, must be entered as Item 2, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C3. Is any stock entered on the books of the corporation at a value in excess of its actual cash value when received? No In excess of the par value of the stock paid therefor?

Is any tangible property paid for specifically with stock before January 1, 1914, entered on the books of the corporation at a value in excess of its actual cash value on that date? No

If the answer to any of the foregoing questions is "Yes," submit a statement showing (a) kind of property, (b) when acquired, (c) par value of the stock paid therefor, (d) actual cash value of the property when paid in, (e) actual cash value of the property on January 1, 1914, if paid in before that date, (f) basis of the valuation stated under "e," (g) value at which the property is entered on the corporation's books, and (h) amount by which such value exceeds the allowable value under Article 55 of the Excess Profits Tax Regulations. Enter this amount as Item 3, Schedule C, for the taxable year and for each year of the prewar period that is affected. (Note that the value January 1, 1914, does not affect the prewar period.)

C4. (a) Was any stock issued by the corporation ever received as a gift or for a consideration substantially less than its par value? No (b) If so, what was the par value of such stock?

(c) What amount of cash or its equivalent was derived from the sale of such stock? $

The amount of "b" over "c" must be entered as Item 4, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C5. Was the business organized or succeeded to, or was its ownership changed since [illegible] No

(a) Did an interest in the business of 50 per cent or more reside in the control of the same persons, corporations, associations, or partnerships, or of any of them?

(b) Were any of the assets entered on the books of the corporation making this return at a higher value than on the books of its predecessor? No

(c) If so, were such assets paid for specifically as such in cash or tangible property?

The increase in book value of any property not so paid for must be deducted from the invested capital for the taxable year as Item 5, Schedule C, unless it can be shown that under the excess profits law and regulations the property was undervalued on the books of the predecessor business.

C6. Is any property paid for with cash or with other tangible property entered on the books of the corporation at a value in excess of the amount of cash paid therefor or the actual cash value of the tangible property paid therefor? No If so, submit a statement showing (a) kind of property, (b) amount of cash paid therefor, (c) actual cash value of other tangible property paid therefor, (d) how that value was determined, (e) value at which the property is entered on the books of the corporation, and (f) excess of "e" over "b" or "c." This excess must be entered as Item 6, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C7. Has adequate provision been made in the expense accounts of the company for (a) [illegible] (b) depreciation? Yes; (c) obsolescence? Yes

(d) depletion of mineral deposits, timber supplies, and the like?

If adequate charge has not been made for depreciation, depletion, obsolescence, and other items, and the value of the property has not been maintained by replacements that have been charged to expense, proper additional charges for depreciation must be computed for all years in which they were not made on the books, and the total amount of such charges must be entered as Item 7, Schedule C, for the taxable year (and for each year of the prewar period that was affected) and deducted in arriving at its surplus and undivided profits.

C8. Has the corporation any stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to excess profits tax? Yes

If so, at what value are they carried on the corporation's books? $

Has any portion of such assets been included in invested capital in accordance with Articles 45 and 46 of the Excess Profits Tax Regulations? No If so, how much? $

Is the balance in excess of the corporation's indebtedness, excluding the amount thereof that has been included in invested capital as Item 1, Schedule B? No If so, state the amount of such excess $

Enter this amount as Item 8, Schedule C, for the taxable year, and make a similar correction for each year of the prewar period.

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SCHEDULE C.—ADJUSTMENTS BY WAY OF DEDUCTIONS (Continued).

ADJUSTMENT OR AMOUNT TO BE (See corresponding instructions on page 3.)	1914	1915	1916	TAXABLE YEAR
1. Valuation of good will, trade-marks, trade brands, franchises, or other intangible property purchased with stock (Articles 57 and 58)	$	$	$	$
2. Valuation of patents and copyrights paid in for stock (Article 59)				
3. Valuation of tangible property paid in for stock (Article 56)				
4. Stock returned to corporation as a gift, etc. (Article 54)				
5. Valuation of assets acquired in reorganizations (Article 60)				
6. Appreciation (Article 47)				
7. Depreciation and depletion (Article 43)	22442	68400 00	224 42	279884 12
8. Excess of stocks and other inadmissible assets over indebtedness (Article 44)				
9.				
10.				
11. TOTAL DEDUCTIONS	$	$ 68400 00	$	$ 279884 12

SCHEDULE D.—CHANGES IN INVESTED CAPITAL DURING TAXABLE YEAR.

Specify (by using red ink for distributions, or otherwise) whether each item represents an addition or a distribution.

Report dividends paid out of profits of prior years but not dividends paid out of profits of the taxable year.

In column 4 enter the number of whole months remaining in the year, plus a fraction consisting of the number of days remaining in the month (including the date of change) divided by the total number of days in the month.

Assets (other than cash) paid in for stock, must be valued in accordance with Articles 56 to 60 of the Excess Profits Tax Regulations.

Nature of additions and distributions	Date	Amount	Number of months (and fractions)	Adjusted amount (Columns 3 × column 4)
1		$		$
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9. NET ADDITION OR REDUCTION		$		$

None

SCHEDULE E.—CHANGES IN INVESTED CAPITAL DURING PREWAR PERIOD.

(Enter additions or reductions separately for each year.)

Nature of additions and distributions	Date	Amount	Number of months (and fractions)	Adjusted amount (Columns 3 × column 4)
1		$		$
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				

None

SCHEDULE F.—NET INCOME DURING PREWAR PERIOD.

ITEM.	1914	1915	1916	1917
1. Net income for year as reported on income tax return. (Do not include figures for less than a whole year's income)	$ 58304 92	$ 4534 72	$	$ 48426 40
2. Plus amount of Federal income tax paid during year	53 80	533 05		
3. Totals for each year	$ 58358 72	$ 5067 77	$	$ 48426 40
4. Less amount of dividends received in 1913				12772 57
5. NET TOTAL for year 1913				
6. GRAND TOTAL FOR PREWAR PERIOD				$ 63726 14

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QUESTIONS

1. Explain the nature of the corporation's business if not adequately described on line 5?
   (a) Main business: Buying & selling grain. Owns a seat on the Board of Trade in Omaha, Nebraska and Iowa
   (b) Collateral business, if any: [illegible]

2. Date of incorporation: Aug 19, 1889 3. Under the laws of what State or country? Nebraska

4. Enter on the following lines the names and addresses of three representative concerns in your locality engaged in the same kind of business:
   Logan-Finnegan Grain Co Omaha Neb
   Omaha Elevator Co " "
   Nebraska & Iowa Grain Co " "

5. What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax (if any)? Specify the year: Par value

6. If any patent is included among your assets, attach a schedule to this return showing for each patent its serial number, date of issue, name of patentee, amount of cash or stock paid therefor, and its present book value.

7. If the corporation ever took over a going business or otherwise acquired a mixed aggregate of tangible property, patents, and copyrights, and good will and other similar intangible property, and paid for such property in whole or in part with stock or other securities, submit a statement showing—
   (a) The name of the concern taken over (or from which the property was acquired).
   (b) The nature of the assets and liabilities so acquired.
   (c) The total par value of the stock issued therefor.
   (d) The value at which each class of assets was carried on the books of the concern from which acquired. (If obtainable submit a balance sheet of the predecessor corporation as at the date of acquisition.)
   (e) The value at which each item was entered on the books of the corporation making this return. The different classes of property must be valued as prescribed by Article 59 of the Excess Profits Tax Regulations and the values so obtained must be used in making subsequent returns, Schedules 1, 2, and 3, Schedule C.
   If patents or copyrights were acquired, state the basis on which their value was determined, and how they were paid for.
   If good will or other intangible assets were acquired, state the basis on which their value was determined, and how they were paid for.

8. Is the corporation affiliated with one or more other corporations within the meaning of Article 77 of the Excess Profits Tax Regulations? No
   If so, submit a statement describing all its intercorporate relationships.

9. Is this return a consolidated return within the meaning of Article 78 of the Excess Profits Tax Regulations? No If so, submit a schedule showing in detail the computation of the consolidated invested capital and income.

10. If the corporation was not in existence during the whole of any one of the calendar years 1911–1913, is its business substantially a continuation of a business carried on during any one or more of those years? ____ If so, give name under which, and address at which, its business was then carried on.

11. Submit a copy, as dated, of—
   (a) The balance sheet of the corporation at the beginning of the taxable year.
   (b) The balance sheet of the corporation at the close of the taxable year.

We, the undersigned, president and treasurer of the above-named company, being severally duly sworn, each for himself deposes and says that the foregoing return, including the accompanying schedules and statement (if any), has been examined by him and is to the best of his knowledge and belief a true and complete return made in good faith pursuant to the Excess Profits Tax Regulations.

Sworn to and subscribed before me this ____ day of ____, 19__

(Seal of officer taking affidavit.)

President.

Treasurer.

153 Cross-Examination

By Mr. Ellick:

Those are the returns witness referred to in his report when he said: "Amended returns and claims for refunds covering adjustments shown in this report for the years 1913 to 1917, inclusive, could not be secured as it was stated by the former Secretary of the company that there were no officers of the company to execute same. Unsigned amended returns for the fiscal 11 months ending June 30, 1917, are enclosed herewith".

Question: "You therefore considered them amended returns of the returns that had been filed by the Updike Grain Company in July, August and September, 1917?"

Answer: "No, I don't think I considered them amended returns. It was really amended computations, is what I considered them at the time I made them out."

Witness referred to them as amended returns—as amendments of something. "We had an order from the Commissioner at Washington to include the year 1917 in the investigations at that time". It was in writing. Witness don't know in whose file it would be. "It came to us in the form of a field order, I believe, from the Agent in Charge." Witness has no copy of the field order that was given to him and does not know where it is.

I think the order from the Commissioner at Washington will appear in the file of the Revenue Agent in Charge at Omaha, I suppose the Revenue Agent in Charge kept a copy of the field order given to me, that is the practice of his office.

The words "Copy of return, fiscal year ending June 30, 1917" at the top of page 4 of exhibit 2, being the report made by witness October 25, 1918, refer to "a retained copy that I found in the company's office". "It was in their files purporting to be a copy of the return. I suppose it was."

154 Witness accepted it as such. Underneath the recital referred to witness set forth different items that appeared in that return. Then underneath those items, underneath the heading "Amended return fiscal year ending June 30, 1917" witness used the same item numbers as appeared in the copy of the return for that fiscal period but changed some of the figures. But witness used no different item numbers than appeared under the heading "copy of return". So that witness determined the net income for the fiscal period upon the same character of data in his amended return, that had been used by the company in their return. And in their re-

turn they had made no claim for dividends under what witness calls 3-D. But for the purpose of computing the four percent tax witness gave them credit for those dividends in his amended return. Witness also gave them credit for excess profits tax which they had not claimed in the amount of $459,081.32. That would be shown on their excess profits tax return, this form 1103, also on form 1031 revised. Witness also saw copy of their return on form 1095, which they filed in August and September, being excess profits tax return for the March 3, 1917 Act. This was simply data that witness used in the computation of the tax. It had nothing to do with showing how much the gross or net income was.

Question: "Now in that report dated October 25, 1918, addressed to John J. Gillin, revenue agent in charge, you determined the tax liability under the October 3, 1917 Act to be $365,564.61?"

Answer: "No, in my report I determined it,—(interrupted)

Question: "In your later report you made a correction of it?

Answer: "Well my original return $373,911.54 and the computation was changed by the auditor in his office."

155 Question: "In Mr. Gillin's office?"

Answer: "Yes sir."

He computed the tax differently was all. He deducted the dividends received as shown in item 3-D from the net income for the fiscal period and took six-elevenths of that amount and deducted the whole excess-profits tax from that amount in determining the amount taxable at four percent. Witness deducted the excess-profits tax and the dividends from the net income and took six-elevenths of the remainder as taxable at four percent. So far as witness knows his own method was correct. Witness is not acquainted with the rule announced in Strong Huett case and does not know that under the ruling in that case the auditor's figure showing the total taxes due to be $365,564.61 is correct, instead of witness' calculation making it 373 thousands and some dollars.

Mr. Blaisdell thereupon made the following statement:

"I understand that 373 thousand is right. I would say, as far as that is concerned, that we won't hold out on that if you can show that the other computation is approved by the Department."

Witness made a supplemental report June 30, 1919. In the return filed by the company it showed a net income of $2,371,997.05; in the amended return prepared by witness he found the net income to be only $2,174,330.64. The company "had returned net income on a different basis from what my return was founded on. They had twelve months in there in the original return while I only have eleven in my return."

From the data that was contained in the two returns filed by the company I could not have computed the correct tax under the October 3, 1917 Act. Witness could not have computed the tax under the Act of October 3, 1917, because he would not have had sufficient information to do it. He
156 could have estimated a tax probably. It is not true that the only information witness did not have would be with reference to the deductions that the taxpayer might claim. There would be additional information required on excess profits tax form 1103 that witness would not have from the return that they filed. Form 1095 showed paid in capital and surplus at the end of the year only.

Asked: "And the law provided that if they did not claim any deduction because of some pre-war income, that the department had to figure it on the basis of seven percent minimum," witness answered "They could accept the minimum, yes sir." Witness was next asked: "So that you could have figured it on the basis that they made no claim for a deduction," to which witness answered: "No, there were other items required in form 1103 that were not asked for in 1095". They did not all relate to deductions. There were additions and reductions from invested capital on account of good will and intangibles.

Witness was asked: "Well suppose they had filled in form 1103 with the same information which was contained in 1095 could you have figured the tax then?" Witness answered: "By assuming that the information that they had given there was correct I could have." That is what witness did assume in the returns which he made up.

Redirect Examination

By Mr. Blaisdell:

When witness spoke of seeing some retained copies of some returns which Updike Grain Company had in their office; there were no retained copies of returns 1103 or form 1031 required to be filed under the Revenue Act of October 3, 1917.

157 Explaining his testimony that the net income of the corporation as finally determined by him for the eleven months period in question, was some Two hundred thousand dollars less than the amount shown by the company or its returns filed under the 1916 Act, witness said: "Well the company was keeping its books on the basis of June 30 to June 30 closing date, and the fiscal year that had been designated to the Collector was July 31 to July 31 of each year. Some time between July 1st, 1916 and July 1, 1917, the company redesignated its fiscal year as June 30th ending June 30th."

So that the final income as witness determined it was adjusted to the eleven month period to make it correspond to their fiscal year. "The fiscal year they designated to the Collector . "Witness was asked: "The invested capital which you finally determined on form 1103 made up and used by you in the determination of the excess profits tax, was that or was that not materially different from invested capital as shown by the corporation on form 1095?" To which witness answered: "Yes sir, it was. About half only. Half as much". Witness was next asked: "In determining the invested capital as you did determine it, where did you get that information, from the books or from form 1095 retained copy which you found in the office?" To which witness answered: "From the books."

Recross Examination

By Mr. Ellick:

Witness said in his report to John J. Gillin, on page one, that from all the books and records available it appeared that the full amount of gross income for each year was reported and no improper deductions taken. Witness excused.

158 Mr. Blaisdell: Now I don't know, Mr. Ellick. We might save some little proof. I presume counsel are willing to concede that this assessment of $373,911.54 has never been paid?

Mr. Ellick: Yes sir.

Mr. Blaisdell: You are willing to concede that that is absolutely unpaid?

Mr. Ellick: Well wholly unpaid except as might be the result of this re-computation of the individual incomes of the parties.

Mr. Blaisdell: Well we could call the Collector there. Officers in the Collector's office.

The Court: It is wholly unpaid by Updike Company.

Mr. Ellick: Yes.

Mr. Blaisdell: I simply want to show that neither the Updike Grain Company nor these defendants have paid any of this amount. Excepting as to some credits they might be entitled to on their individual returns.

Mr. Ellick: Excepting as to over-payment in their individual returns.

Mr. Kinsler: Yes, that is the matter to be determined later on.

Mr. Ellick: That is the matter that we are going to defer. Of course, we do not want to get ourselves in the attitude by any admission that we are not asking advantage of the presumption of payment as it develops from the statute of limitations.

Mr. Kinsler: What we mean is this. We want it agreed that neither the Updike Grain Company, the corporate taxpayer, nor any of the defendants in this suit have ever paid, (interrupted).

Mr. Brogan: You may make the proof very simple Mr. Kinsler on that. Prove it. Call anybody.

Examination

By Mr. Blaisdell:

Russell C. Anderson, witness for complainant, being duly sworn, testified: that he is in charge of income tax accounting for the Collector of Internal Revenue, Omaha, Nebraska, and has been for the past seven years. Witness is familiar with an assessment of income and excess-profits tax made against the Updike Grain Company for the fiscal period
159 ended June 30, 1917, in the amount of $373,911.54.

Neither that amount or any part of it has been paid. The entire amount is outstanding and unpaid on the books of the Collector at this time-witness has something to do with the listing of the returns filed. Asked: "Do you know whether or not, Mr. Anderson, the Updike Grain Company or any one on its behalf has ever filed form 1031 revised, or form 1103 an excess profits tax return, either one or both for the eleven months period ended June 30, 1917, for the tax provided by the Revenue Act of October 3, 1917?" witness

answered: "our card records would indicate that they did not". The witness was next asked. "Your record shows that no such returns have ever been filed", to which witness answered: "Yes sir."

Cross-Examination

By Mr. Ellick:

They do not file a return on form 1031 revised under the Act of October 3, 1917. But they did file a return on form 1031 revised for the income for the fiscal period June 30, 1917.

Redirect Examination

By Mr. Blaisdell:

Witness could not tell when that return was filed without looking at the card record. There has been none filed since October 3, 1917.

Recross Examination.

Witness keeps a record of the notices of assessment that are sent to the taxpayer. The record shows date when notices were sent and upon what form it was sent. Witness has the record. First notice and demand was sent on form 17 mailed 9-25-20. Form 21, second notice and demand mailed September 20, 1921, and form 69 issued December 22, 1921. Form 69 is warrant of distraint.

160 Witness was asked: "Calling your attention to notice and demand dated July 16, 1921, is that a form of notice and demand that went out of your office?", to which witness answered: "Yes. There were two forms 17 issued. Claim rejected. Form 17, issued July 16, 1921. Form 17. Witness does not find any others besides that.

In none of the notices anad demndas tht witness has referred to was there any claim made for any penalty for failure to file the return. And the books contain no assessment of any penalty against Updike Grain Company for failure to file a return. And so far as witness knows none has ever been made for the fiscal period ending June 30, 1917, under the Act of October 3, 1917. Witness was asked: "When an assessment of the penalty is made against a taxpayer for failure to file a return, that comes through to your books just the same as any other assessment?", to which witness answered: "Yes sir". Witness excused.

Mr. Blaisdell: Complainant offers in evidence as exhibit number 3 a letter dated March 1, 1927, addressed to James Kinsler, United States Attorney, Omaha, Nebraska, by C. R. Nash, Acting Commissioner of Internal Revenue.

Exhibit number 3 was received in evidence and is as follows:

TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

GC:C:IRB
220256

MAR 21 1927

Hon. James C. Kinsler,
United States Attorney,
Omaha, Nebraska.

In re: Updike Grain Company,
Omaha, Nebraska.

Sir:

Reference is made to your letter of January 14, 1927 and previous correspondence, with reference to the matter of beginning a suit in equity against the former stockholders of the Updike Grain Company, a dissolved corporation, to collect additional income and excess profits taxes assessed against said corporation in the amount of $373,911.84 for the eleven months' period ended June 30, 1917.

You are hereby authorized to begin suit at once.

A bill of complaint has been prepared in this office, and is herewith transmitted for filing, subject to your approval. Two carbon copies thereof are enclosed. Additional copies will be transmitted as soon as they can be mimeographed, in order that you will have a sufficient number thereof for service upon all of the defendants. Service upon the defendants who reside outside the Judicial District of Nebraska should be made pursuant to the provisions of Section 51 of the Judicial Code, as amended.

You are requested to acknowledge receipt of said complaint, and to advise this office when the suit has been commenced. You may call upon this office, and the Collector of Internal Revenue for the District of Nebraska, for such assistance as you may require in the prosecution of the suit.

Respectfully,

Acting Commissioner.

Enc. 1473
mb.

162 Mr. Blaisdell: Complainant offers in evidence Exhibit number 4, being telegram received by James C. Kinsler, United States Attorney, from Blair, Commissioner of Internal Revenue, authorizing him to file the present suit.

Exhibit number 4 was received in evidence and is as follows:

WESTERN UNION

Service

This is a full-rate Telegram or Cablegram unless its character is indicated by a symbol in the check or in the address.

SYMBOLS

DL	Day Letter
NM	Night Message
NL	Night Letter
LC	Deferred
CLT	Cable Letter
WLT	Week End Letter

NEWCOMB CARLTON, PRESIDENT J. C. WILLEVER, FIRST VICE-PRESIDENT

The filing time as shown in the date line on full-rate telegrams and day letters is the time of receipt at destination as shown in a

1929 APR 2 PM 4:1

Received at 1321 Farnam Street, Omaha, Nebr. ALWAYS OPEN

KA515 23 GOVT 1 EXTRA

K WASHINGTON DC 2 501P

BE

JAMES C KINSLER

UNITED STATES ATTORNEY OMAHA NEBR

RELET TWENTY EIGHTH ENCLOSING REDRAFTED BILL OF COMPLAINT UPDIKE GRAIN COMPANY THIS OFFICE APPROVES AND AUTHORIZES FILING REDRAFTED COMPLAINT BEGIN SUIT IMMEDIATELY

BLAIR COMMISSIONER.

"Exhibit 5 is a letter directed to me as United States Attorney at Omaha, Nebraska, and dated March 15, 1927. It comes from the Attorney General of the United States."

"Q. How did that letter come into your hands?"

"A. That is what I wanted to explain. This letter was handed to me in the department,—in the Department of Justice Building in Washington, District of Columbia, and in the office occupied by the attorney general of the United States and the assistant attorney general, and while it is dated March 15, 1927, that date was simply put on there as,—with this object. It was understood at the time that this question had been raised apparently by the pleadings as to whether I had been given,—as to whether the United States attorney at Omaha had been given authority to commence and prosecute this action, and while I was at the office of the attorney general in Washington during the month of February, 1928, just during the past month, I visited Mr. Keys, the special assistant to the attorney general and told him I believed that we should have a letter in our files authorizing me to prosecute this action. And the letter was pre-dated and it it is simply to make the record, Now the reason for that, I might, explain, is this."

"Q. Well, yes, you may. Well just a moment."

"A. Well first I might explain my reason."

"Q. Was that letter which you have in your hand then, delivered to you in the office of the attorney general?"

"A. Yes, sir. In the office of,—in the attorney general's department. In the office of assistant attorney general Willebrandt, who is in charge of income tax matters and in charge of this case and handed to me personally by Mr. Sewall Keys, Special Assistant to the Attorney General, who is here in the trial of this case. I would like to add this to what I have to say. [I would like to add this to what I have to say.] That I have been in Washington in the office of the attorney general two or three times, I am not sure which, for conferences regarding the prosecution of this very case and have been there in conference with the assistant attorney general, Willebrandt, and also with the special assistant to the attorney general, Mr. Keys, all with regard to the prosecution of this action and what should be done and questions of law that had been raised, and have also been over to the general counsel's office and had conferences with Mr. Charest himself regarding the matter. And at all these times the conferences have proceeded upon the fact that this case was here being prosecuted and relating to the details of the

prosecution and the questions of law that were being rais
were discussed."

"Q. Well at these various conferences between the of
of the attorney general and general counsel to the bureau
internal revenue, did you have the full approval of those o
fices in the prosecution of this suit"

"A. Yes sir."

"Q. Now this letter Exhibit 5 which you hold in you
hand, I believe you said that was delivered to you in the offi
of the department of Willebrandt assistant attorne
166 who has charge of prohibition,— (interrupted)"

"A. That has charge of income taxes and in charge o
this identical case, but that letter was handed to me by
Mr. Sewall Keys who is here present in court and who is
Miss Willebrandt's division and who himself has charge
his employees in these income tax cases."

"Q. That is all."

Cross-Examination

By Mr. Ellick:

Mr. Ellick: We have no cross-examination unless you in
tend to offer that exhibit.

Mr. Blaisdell: We offer Exhibit 5 in evidence.

Mr. Ellick: I would like to examine into it."

"Q. This Exhibit 5 you say was prepared in Febru
1928?"

"A. Yes sir."

"Q. And it was post-dated?"

"A. Pre-dated."

"Q. Or pre-dated?

"A. Yes."

"Q. As of March 15, 1927 so it would purport to be
letter as of that date?

"A. Yes, I think so."

Exhibit number 5 was received in evidence and is as fo
lows:

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

MVF-
5-45-3-

SK-MKP

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

March 15, 1927

James C. Kinsler, Esq.,
United States Attorney,
Omaha, Nebraska.

Sir:

United States v. Nelson B. Updike et al,
Transferees of the Assets of Updike Grain
Company, a Nebraska corporation

The Treasury Department advises that during the month of August, 1917, Updike Grain Company, a Nebraska corporation, converted all of its assets into cash, which was distributed pro rata amongst its stockholders according to their stock holdings; that at the time of the distribution of the corporate assets the corporation was indebted to the Government in the sum of about $374,000 for war income and war excess profits taxes imposed on the corporation by the Revenue Act of October 3, 1917.

It has been decided to commence a suit in equity in the District of Nebraska to compel Nelson B. Updike and all other stockholders of Updike Grain Company who received the assets of the corporation to account to the Government up to the amount of the taxes imposed on the said company, together with interest.

Accordingly you are hereby authorized and directed to commence an action in equity against all of the transferees of the assets of Updike Grain Company to compel them to account for and pay over to the Government the money of the corporate taxpayer received by them as above set forth up to the amount of said taxes imposed on Updike Grain Company, together with interest as provided by law and the costs of the suit.

Respectfully,

For the Attorney General,

(MABEL WALKER WILLEBRANDT)
Assistant Attorney General.

168 Mr. Kinsler: In order that counsel for the defendants may understand just why we are doing what we are doing, I just want to make a very brief statement that will take a couple minutes. Subsequent to and after thorough consideration of this case and conferences in the attorney general's office, we agreed that it was not a suit to collect a tax, but it was a suit to recover trust funds, for money had and received by these defendants for the use of the Government and we thought that we ought to have the authority of the attorney general to maintain this suit to recover a trust fund, and it was for that reason that the letter was procured from the attorney general's office. One other matter I would like, I would like to have either an agreement or else we can call Mr. Updike or some others, that while it is now in evidence that no part of this tax,—that was assessed against the Updike Grain Company has been paid by or on behalf of the corporate taxpayer, it is also admitted that neither Mr. Updike nor any of the other defendants have paid any of the money that they received and which the government alleges to be a trust fund for which this action is brought.

Mr. Ellick: We can not concede that because we claim that the amount that they paid in excess of what they should have paid had they paid this tax, was part of this money.

Mr. Kinsler: As I understand you, you contend that the individual defendants here paid more income tax on their personal incomes during the year 1917 than they would have paid if the corporation had paid this $373,911 in place of turning it over to these defendants. That is a contention in your answer.

Mr. Ellick: Well it resulted in that because they returned more income than they should have returned.

Mr. Kinsler: But aside from that controversy which is raised by the pleadings and which will be eventually passed upon by the Court, I mean, it is agreed that no part of this trust fund has ever been paid over to the government.

169 Mr. Ellick: Well your witnesses testified that nobody paid the tax.

Mr. Kinsler: I understand.

The Court: I think payment here is a defense, and that you do not need to prove that it has not been paid.

Mr. Kinsler: We thought that too, but this is out of an abundance of caution because we don't want to take any chances on anything.

Complainant obtained leave to amend paragraph XXVIII of the Amended Bill of Complaint by interlineation by adding after the words "Internal Revenue" the words "and the Attorney General of the United States" Complainant rests.

Mr. Brogan: It is understood of course that the motion directed toward the petition because it does not state sufficient facts, is still before the Court. We are not waiving that by going on with the evidence. The order of his honor, Judge Woodrough, was that it would be held and decided with the whole case. The rule which provides for a motion to dismiss instead of a demurrer, does provide that that may be postponed and disposed of at the final hearing at the discretion of the Court, and Judge Woodrough exercised that discretion and postponed that application and that is still before the Court and a part of the whole case.

Defendant's Evidence.

It was admitted by counsel for complainant that no proceeding had been commenced by the United States against these defendants or any of them under the provisions of Section 274 or Section 280 of the Revenue Act of 1926. Counsel for complainant also stated that: "This suit in equity against these defendants is the only proceeding that the government has commenced against these defendants or any of them." And it was admitted by counsel for complainant that no sixty-day notices have been sent to any of these defendants at any time pursuant to the provisions of Section
170 274 of the Revenue Act of 1926.

Mr. Ellick: Defendants offer in evidence Exhibit number 6, being a letter written by George L. Loomis, Collector of Internal Revenue, to the Updike Grain Company under date of July 2, 1917, which plaintiff admits was signed by George L. Loomis at that time collector. Exhibit number 6 was received in evidence, without objection and is as follows:

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR

DISTRICT OF NEBRASKA

July 2, 1917.

Wydike Drain Co.,

625 Grain Exchange,

Omaha, Nebraska.

Gentlemen:

Your notice designating June 30th as the end of your fiscal year has been accepted.

The last return of annual net income filed by you included July 31, 1916. Therefore, a return is due covering the period beginning August 1, 1916 and ending June 30, 1917. Your next return will then be due within sixty days after June 30, 1918, which means on or before August 29, 1918.

Respectfully,

Collector.

CEG.
CFG-FFF

161

172 Mr. Ellick: Defendants offer in evidence Exhibit number 7, pages one and two, being photostatic copy of income tax return of the Updike Grain Company for the 11 months fiscal period, ending June 30, 1917, filed with the Collector of Internal Revenue July 25, 1917, with all the endorsements and notations and stamps upon it—upon the return. Mr. Ellick stated that Exhibit 7 was furnished to defendants by the government and was part of answers under Equity Rule 58 in files.

Complainant objected to the offer for the reason that the offered exhibit was immaterial and not competent to prove any issue tendered by the defendants or any of them; and for the further reason that it appears upon the face of the return that it is a return of annual net income under parts 2, 3, and 4 of the Act of September 8, 1916; and for the further reason that it appears upon the [fact] of the return that it is not a return filed under the Revenue Act of October 3, 1917.

The objection was overruled by the Court and an exception allowed complainant.

Complainant then objected further to the offered Exhibit number 7 on account of what appears to be something stamped on that part of the exhibit which is headed "General Instructions". The stamped impression being on the right side of the page and reading in the first line, "Assessment", in the second line "Tax", dollar sign "373,911.54", and then the word "Penalty" with nothing under it. Then in the next line the word "Basis" above "R. A. R. 6-30-1919" and after those figures an initial, and then in the lower line after the word "Date", January, 1920", and then on the next line at the conclusion of the stamped impression the word "Page" and the figures "14". The word "Line" and the figure "1". The objection is made to this stamp because it is not material or relevant to any issue in the case; and because there is no sufficient foundation laid for the offer of the stamp
173 which is on Exhibit number 7; there is nothing to show who put it on or how it got on or what it means, nor what it has reference to.

The Court: I will reserve ruling on the objection.

Exhibit number 7 was received in evidence over complainant's foregoing objections and is as follows:

TO BE FILLED IN BY INTERNAL REVENUE BUREAU.

Audited by _____

DEPT. OF NEBR.
JUL 25 1917
INT. REV.

Form 1031.
(Revised October, 1916.)

37-633-993

INCOME TAX.

THIS PENALTY
FOR FAILING TO MAKE THIS RETURN OR THE MAKING OF THE COLLECTOR OF INTERNAL REVENUE, WITHIN THE TIME REQUIRED BY LAW IS NOT MORE THAN $1,000 AND THE ASSESSMENT IS INCREASED FIFTY PER CENT.

RETURN OF ANNUAL NET INCOME

(Title I, Parts II and III, of the Act of September 8, 1916.)

CORPORATIONS.

(OTHER THAN INSURANCE COMPANIES.)

TO BE FILLED IN BY COLLECTOR.

Collection District of NEBRASKA 5th

Assessment List No. 4 ____ Line ____ 1917

Page 3 Line 20

IMPORTANT.

Read this form and all instructions carefully and fill in supplementary statement before giving the totals called for. Totals in supplementary statement should agree with totals in return.

ADJUSTED

Above space to be stamped by Collector, showing district and date filed.

RETURN OF NET INCOME for the { Calendar / *Fiscal } year ended June 30, 1917

by The Upshur Grain Company, Grain (Kind of business)

(Name of corporation, joint-stock company, or association.)

and located at 625 Omaha Grain Exchange, Omaha, Nebraska

(Street and number.) (City or town.) (State.)

(The address given must be that of the principal place of business of the corporation.)

If no figures are to be extended opposite any item in the return, the word "None" should be inserted.

1. Total amount of paid-up capital stock outstanding at the close of the year, or if no capital stock, the capital, other than interest-bearing indebtedness, employed in the business at the close of the year	$	7000 00 00
2. Total amount of bonded and other interest-bearing indebtedness outstanding at close of year, exclusive of indebtedness wholly secured by collateral, the subject of sale or hypothecation in ordinary business of the corporation	$	1009 67 91

3. Gross income	Dollars	Cts.	Deductions.	Dollars	Cts.
(a) From operations	2026 98 06		4. (a) Expenses, general	875 46 68	
(b) From rentals	none		(b) Payments in lieu of rent	none	
(c) From interest	56 25 36		5. (a) Losses sustained charged off	177 06	
(d) From dividends received	642 79 56		(b) Depreciation charged off	none	
(e) From other sources	116 65 64		(c) Depletion charged off	none	
Total gross income	2842 69 62		6. (a) Interest paid (see Note 6)		

E. R. Cook

_____, being duly sworn, each for himself, deposes and says that the foregoing report and the supplementary statement and in any additional list or lists attached to or accompanying it, has examined the same and to the best knowledge and belief, the same is correct in each and every particular.

M Bruce
President.

Cabore
Treasurer.

GENERAL INSTRUCTIONS.

Returns made on the basis of a calendar year must be filed on or before March 1 with the Collector of Internal Revenue of the district in which is located the principal place of business of the corporation, if made on the basis of a FISCAL YEAR* they must be filed within 60 days after the close of such year.

Returns to make returns of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to the time the return would be due if made on the calendar year basis, file with the Collector a notice in writing designating the last day of some month as the close of the fiscal year, and the return for such fiscal year or thereafter must be filed within 60 days after the closing date of the fiscal year so established. A return for that portion of the calendar year ending with the date designated as the close of the fiscal year must be filed on or before the time prescribed in the return within the year fixed time, the Collector is authorized to grant an extension of the filing period not exceeding sixty days, provided an application for such extension is made by the corporation prior to the expiration of the period for which the extension is granted. The Commissioner is authorized to grant such further extensions of time [illegible] as he may deem proper.

The return must be sworn to by the president, vice-president, or other principal officer of the corporation, that is, by the president, vice-president, or other principal officer, if he is required to administer oaths, and the seal of the attesting officer, if he is required to have

[illegible] a list of all its subsidiary companies, if any, with the location of the principal place of business of each.

Every foreign corporation required to make returns to the Collector of the District in which is located the principal place of business or agency in the United States, its return will be made on the capital invested in the United States, and including income derived from dividends on [illegible] not set out in the Act. The deductions allowed [illegible] not set out in the Act.

In the case of a foreign corporation [illegible] capital invested in the United States, all as specified, not set out in the Act. In the case of a foreign corporation [illegible] dividends and interest [illegible] will be withheld at the source.

Returns shall be rendered [illegible] and fraudulent returns shall be liable to a penalty of not [illegible] prescribed by law, and 100 per cent in the case of a false or [illegible] the Collector, and if known that [illegible] willful neglect, the 50 per cent additional tax will not be remitted.

Any person who shall make any false or fraudulent returns or statement with intent to defeat [illegible] shall, on conviction thereof, be fined not exceeding $2,000 or be imprisoned [illegible] year, or both, at [illegible] of prosecution.

SUPPLEMENTARY STATEMENT.

This statement must be rendered by every corporation, joint-stock company, or association, without which the return will not be accepted as complete. The [illegible] items and bear corresponding numbers, and the totals set out in the above return must agree with the totals herein.

1. [illegible] of capital stock [illegible] this date. Include only such stock [illegible] of the year and for which [illegible] payable in installments or [illegible] as less than 25% has been actually paid in upon such installments or [illegible] if the paying stock is issued without par value, the [illegible] at the close of the year, not including bonds [illegible]

[illegible]	$	7000 00 00
[illegible]		none
[illegible]	$	7000 00 00

2. INDEBTEDNESS:

All interest-bearing indebtedness, for the payment of which the corporation or its property is bound, should be reported below. In the case of banking corporations and like financial institutions, deposits should not be reported as indebtedness. Indebtedness wholly secured by collateral, the subject of sale or hypothecation in the ordinary business of the corporation, should be reported here, but such indebtedness must not be entered under Item 2 above nor be considered in determining the amount of interest deductible under Item 6 (a).

Character of obligation.	Rate of interest.	Principal.
Various Note	Various	1009 67 91
Total indebtedness		$ 1009 67 91

185

3. GROSS INCOME:

All manufacturing, mercantile, or other corporations which determine their annual gain or loss by inventory are required to state the same in the form indicated below. If the annual income or loss is determined otherwise, the methods employed must be stated in the space provided therefor. In case the annual gain or loss is determined by inventory, merchandise must be inventoried at the cost price, as any loss in subsequent value will ultimately be reflected in the sales during the year when the goods are disposed of.

(a) FROM OPERATIONS:

Per inventory—

Sales during year	$	77 90 46 95 26	
Stock on hand at close of year		15 30 05 51 61	
Total			$ 92 95 92 17
Purchases during year	$	76 94 67 70 91	
Stock on hand at beginning of year		72 61 70	
Total			$ 77 67 29 61
* Total gain or loss [3 (a)], first page			$ 15 28 62 56

In the case of manufacturing corporations, "Purchases during the year" will include so much of the cost of goods finished or unfinished, sold or unsold, as has not been separately deducted under any item of the return.
Overhead charges should not be included in inventory (see Item 4).

*(If inventory shows loss, make entry in red ink or strike out "gain.")

If inventory is not used, state below method of determining gain or loss from operations:

In case of the sale of capital assets acquired prior to March 1, 1913, the profit or income to be returned will be the difference between the fair market value of such assets as of March 1, 1913, and the price at which they are sold. If acquired subsequent to March 1, 1913, then the profit or income to be returned is the difference between the cost and the selling price.
In the case of the sale of assets acquired prior to March 1, 1913, state—

(1) Original cost of assets..... $ 0

(2) Fair market price or value as of March 1, 1913. .....

(3) Price at which assets were sold..... .....

State how fair market price or value as of March 1, 1913, was determined:

(b) FROM RENTALS:
Rentals to be reported as income will include all payments received in cash or its equivalent as rent on buildings or other property owned by the corporation making the return, as well as all royalties received.

(c) FROM INTEREST:
Interest to be reported as income includes all interest received on bonds or securities owned by the corporation with the exception of interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions, which latter interest for the purpose of information should be extended below:

U. S., STATE, AND OTHER OBLIGATIONS.

Name of obligation.	Amount of principal.	Rate.	Amount of interest received.
Various Notes	$ Various	Various	$ 54,752.36
Total	$		$ 54,752.36

(d) FROM DIVIDENDS RECEIVED:
Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in stock or money or other property, must be returned by the receiving corporation as income of the year in which the distribution was made or ordered to be made. Stock dividends must be returned to the amount at their cash value and such cash value is held to be the proportionate share of the surplus accrued to the paying corporation since March 1, 1913, as is represented by the stock distributed or ordered to be distributed to the receiving corporation.

(e) FROM OTHER SOURCES:
All other sources from which income has been received, and the amount thereof, should be itemized below.

Commissions	$	1166576
Total	$	1166576

4. EXPENSES, GENERAL:

This item should include only the ordinary and necessary expenses paid within the year in the maintenance and operation of the business and properties of the corporation, itemized as per schedule below, and will not include any disbursements the deduction of which is specially provided for in the return form proper on the reverse side of this form.

Interest paid on indebtedness wholly secured by property collateral the subject of sale or hypothecation in the ordinary business of the corporation as a dealer only in the property constituting such collateral or in the loaning of funds thereby produced, is not regarded as within the limitation against deduction as an amount of the interest paid on such indebtedness not in excess of the actual value of the collateral securing it.

All expenses of material, labor, fuel, and other items entering into the cost of goods purchased, sold, or manufactured are deductible under this head as expense, provided such items have been duly accounted for in determining the cost of purchases during the year when the income derived from operations is ascertained through an inventory as set out in Item 3 (a) of this statement.

Expenditures for additional capital assets not sold in the sales or appreciably lessening the value of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or repairing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be off-set against such sums, if any, realized on sales or exchanges.

Payments made to officers or employees who are stockholders, which payments are made in the guise of salaries or compensation and the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

(a) 1. Labor, wages, commissions, etc	$	157 96 46 61
2. Fuel, light, power, etc		17 66 78 54
3. Rentals (ordinary)		34 12 74 46
4. Repairs, ordinary and incidental		16 50 93 32
5. Interest on indebtedness wholly secured by collateral the subject of sale, etc		9 08 22
6. Salaries of officers		34 83 27 71
Insurance		18 02 87 60
Insurance		45 08 40 00
Legal Telephone & Postage		24 46 04
Advertising		7 53 32 5
Traveling Expenses		5 39 79 8
Exchange		3 47 0 19
Miscellaneous		4 20 69 2
Total expense	$	375 46 63 71

4. (a) 5. Names of officers and employees to whom salaries of $3,000 or more were paid during the year and amount paid to each. (If the space below is not adequate, a list may be filed—Item 4 (a) containing this information should be attached hereto, form

Name.	Address.		Amount.
J. M. Geraghty	Milwaukee	Wisc	$ 6,666.66
J. M. Woodford	"	"	4,249.94
J. M. Walker	"	"	3,166.66
J. M. Howard	Omaha	Nebr	3,600.00
J. B. Bell	"	"	3,000.00
H. M. Hyatt	"	"	3,000.00
H. M. Hyatt	"	"	4,166.67
J. A. Kuhn	"	"	4,050.00
	Total		$ 36,883.73

Corporations paying to individuals salaries or wages in excess of $5,000 per year are required to withhold the normal tax of 2 per cent (1 per cent for 1916) on the entire amount so paid. Salary certificates are provided for this purpose, and the tax must be withheld on the amount in excess of the exemption allowed. Returns of taxes withheld must be rendered on Form 1042, which, together with all certificates of compensation, must be filed in the collector's office not later than March 1.
Notwithstanding the withholding of the tax, the individual receiving income from this and all other sources of $3,000 or more must also make returns on Form 1040.

(b) PAYMENTS OF LOSS OR RENT:
This item should include all repairing and other charges, including any interest payments, that the corporation is required to make on the rent or loss of the real property in which it has no title, interest, or equity. See Rule 6 (c).

5. (a) LOSSES:
Losses deductible under this item must be distinguished from depreciation or shrinkage in the value of capital assets not connected with the actual sale or other disposition thereof. The losses must be sustained during the year in the case of corporations keeping their accounts on the basis of actual receipts and disbursements, and if the corporation keeps its accounts on the accrual basis losses must be sustained during the year for which the return is made. The difference between the fair market price or value as of March 1, 1913, and the selling price.
Losses compensated by insurance or otherwise are not deductible.

Kind of asset.	No. Original cost.	Date sold or otherwise disposed of.	Amount charged off.
Personal Accounts Railroad Claims	$ 1799	Various	$ 1799 06
Total			$ 1799 06

What were the declared losses sustained by in each case? Various dates.
How were they to ascertained? Monthly Balance Collection

In case of losses resulting from the sale of capital assets acquired prior to March 1, 1913, state—

(1) Original cost of assets..... $.....

(2) Fair market price or value as of March 1, 1913. .....

(3) Loss resulting from such sale..... .....

State also how the fair market price or value as of March 1, 1913, was ascertained:

(b) DEPRECIATION:
The amount deductible on account of depreciation is an amount charged off which merely represents the loss during the year in the value of personal property by reason of exhaustion, wear and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds, and like securities, as well as any other intangible assets, are not subject to exhaustion, wear and tear within the meaning of the law. Hence any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or loss.
Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction, since any loss due to the shrinkage in the salable value of the merchandise will be reflected in the sales when the merchandise is disposed of.

Kind of property.	Its cost.	Probable life after acquirement.	Amount of depreciation. This year.	Amount of depreciation. Previous years.
	$ None		$	$
Totals	$		$	$

If buildings, state kind of construction.

(c) DEPLETION:
Depletion applies to the exhaustion of natural deposits, and contemplates a deduction to return to the corporation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market value at, or cost of, such property at that date. An allowable deduction on account of depletion must not exceed the fair market value in the mine of the product thereof mined and sold during the year, and in case of oil or gas wells the amount deductible should be computed upon the basis of the decline in the settled flow. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property.	†Its cost if acquired subsequent to March 1, 1913.	†Fair market value as of March 1, 1913.	Amount of depletion. This year.	Amount of depletion. All years to date.
	$	$ None	$	$

*Coal, iron ore, copper, oil, or gas.
†State how fair market value as of March 1, 1913, was determined

6. (a) INTEREST DEDUCTIBLE:
The amount of interest deductible under this item is the amount actually paid within the year on an amount of bonded or other indebtedness not in excess of the paid-up capital stock outstanding at the close of the year, or if no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.
Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is not in excess of the needs of the business, but does not include any borrowed capital or interest bearing indebtedness.
Interest, so called, or dividends paid upon preferred capital stock, is not deductible.
Interest deductible under this item includes all interest actually paid within the year not in excess of the limit hereinbefore indicated on any debt for which the corporation or any property in which it has title, interest, or equity is pledged, except interest on indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company, etc., which interest is deductible under Item 4 (a) as a business expense.

INTEREST PAYMENTS ACTUALLY MADE DURING YEAR.
All forms of indebtedness upon which interest was paid should be listed here.

Name or kind of obligation.	Amount of principal.	Rate of interest.	Amount of interest paid.
Various notes	$ Various	Average 6%	$ 98 70 73 25
Total	$		$ 98 70 73 25

(b) INTEREST PAID ON DEPOSITS:
Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, loan or trust company is deductible in the entire amount so paid.

7. (a) TAXES—FEDERAL, STATE, ETC..... $ 6687.09

(b) TAXES—FOREIGN..... .....

Taxes deductible under these items are such taxes as are imposed by the United States, by any State or Territory, or by any political subdivision thereof, or by the Government of any foreign country, and are actually paid or accrued on the books of the corporation, not in excess of the amount due and payable within the year for which the return is made, except that taxes imposed under the laws of a foreign Government are not deductible from the income arising or accruing to a foreign corporation by reason of the business transacted or capital invested in this country, and except that taxes paid for local benefits or taxes paid by corporations pursuant to covenants guaranteeing their bonds to be tax-free, are not deductible.
Taxes paid by banks or other corporations on the value of their capital stock outstanding and in the hands of stockholders actually deducted from taxes not a primary liability of the stockholders, as such, chargeable against their income.
State whether or not this return is made on the basis of actual receipts and disbursements Yes
If not, describe fully what other basis or method was used in computing said income.

176 Mr. Ellick: Defendants offer in evidence Exhibit number 8, being excess profits tax return of the Updike Grain Company filed with the Collector of Internal Revenue on August 30, 1917, covering the fiscal 11 month period ending June 30, 1917.

Mr. Kinsler: The government objects to the offer because it is not relevant to the issues, does not tend to prove any issue tendered by the defendants and immaterial, and for further reason specifically that it appears upon the face of the return that it is an excess profits tax return made under the provisions of Title II of the Act approved March 3, 1917, and for the further reason that it appears upon the face of the return that it is not a return made in accordance with the provisions and requirements of the Revenue Act of October 3, 1917.

Complainant's objection was overruled by the Court and an exception duly allowed.

Exhibit number 8 was received in evidence over the foregoing objection of complainant and is as follows:

7108+24

TREASURY DEPARTMENT
INTERNAL REVENUE BUREAU

Form 1095

Collection District NEBRASKA

Assessment List 28-A AUG 191 1917

Page 5 Line 23 374

Audited by

RECEIVED
AUG 30 1917
DIST. OF NEBR.

Collector's stamp, showing district and date filed.

This SUPPLEMENTAL INCOME-TAX RETURN is to be filed by all corporations, joint stock companies or associations, and insurance companies having an annual net income in excess of $5,000 and making income tax returns on the basis of a properly established fiscal year ending with the last day of some month in 1917 other than December 31.

IMPORTANT NOTICE.

Before undertaking to insert any figures in the subjoined form, read carefully all instructions given below.

PAID
AUG 30 1917
GEO. L. LOOMIS
Collector

EXCESS PROFITS TAX

(Title II, Act Approved Mar. 3, 1917.)

NOTE.—In cases wherein no figures are extended insert the word "None."

SUPPLEMENTAL RETURN OF ANNUAL NET INCOME for the fiscal period from July 21, 1916 to June 30, 1917.

By H. Updike Farm Company, Grain
(Name of person, firm, or corporation) (Kind of business.)

located at 6 & Cuming Sts. Omaha, Nebr.
(Post office address.) (City or town, and State.)

(The address given must be that of the principal place of business as set out in the main income tax return.)

1. Total amount of actual capital invested and used in the business (not including any borrowed money or property), classified as follows:			
(a) Actual cash paid in	$ 70000 00	✓	
(b) Actual cash value, at the time of payment, of assets other than cash paid in			
(c) Paid in or earned surplus and undivided profits used or employed in the business	100 84 05		
Total invested capital		$ 170084 05	✓
2. Number of months intervening between January 1, 1917, and closing date of fiscal year		6 (No. of months.)	✓
3. Total net income for the fiscal year as shown on return of annual net income (Forms 1030, 1030A, or 1031)		$ 237199 75	✓
Deduct specific exemption	$ 5000 00		
Deduct 6% of total invested capital as set out in item 1	$ 10205 04 ✓	17305 04	✓
4. Total profits in excess of exemptions, for full fiscal year		$ 219894 71	✓
Deduct proportion of such excess profits as the period from the beginning of the fiscal year to January 1, 1917, bears to the full fiscal year		99951 32	✓
5. Net income subject to tax for that part of the fiscal year intervening between January 1, 1917, and the close of the fiscal year		$ 119943 39	✓
6. Tax at 8 per cent		$ 9595 47	✓
		$	

Secretary
Treasurer,

of the foregoing statement are,

President.

Secretary

INSTRUCTIONS

In making their returns of annual net income for the calendar year 1916, corporations, joint stock companies, or associations, and insurance companies in making their returns of annual net income for the calendar year 1916, no provision was made for reporting the "Excess Profits" tax law, no provision was made for reporting the passage of the "Excess Profits" tax law. Hence, this form is intended to supplement the regular income-tax return for the year 1916, and when executed it will be transmitted to the Collector of Internal Revenue of the district in which the return is made. Forms will be revised to meet the requirements for subsequent years, of both the income tax and excess profits tax, of corporations, joint stock companies, etc., whose regularly established fiscal year ends on December 31, 1917.

The tax imposed by law under this title shall be the year ending December 31, 1917, and the title shall be subject to the tax.

There is hereby levied and assessed a tax of 8 per cent annually upon the amount by which the net income of the year exceeds

(1) the actual cash value, at the time of payment, of assets other than cash paid in; and (2) paid in or earned surplus and undivided profits used or employed in the business during the year, including borrowed money or property. As represented by (1) and (2), actual capital invested in the amount of cash (1) or by the actual cash value at the time (2) of the tangible assets received by the corporation, and which was actually used or employed in the business during the year; actual capital invested is the amount of the earned or paid in surplus and undivided profits which the return is made, and which was actually used or employed in the business during the year; the specific exemption is to be computed in the actual capital invested in the business at the beginning of the year, that is from January 1, 1917, to the close of a properly established fiscal year, that is from January 1, 1917, to the close of a properly established fiscal year (other than the calendar year) ending with the last day of some month in 1917 other than December 31, 1917, and 8 per cent of the actual capital invested, as the period covered by the return bears to an entire

The net income subject to tax is to be computed on the basis of a properly established fiscal year (other than the calendar year) ending with the last day of some month in 1917 other than December 31, 1917, to the end of that proportion of the taxable income returned, which the time from January 1, 1917, to the end of the period from which the return is made bears to the entire period for which the return is made, and which is to be the basis for computing the excess profits tax.

Corporations, joint stock companies, associations, and insurance companies will prepare and verify the return, attach it to the income-tax return, and forward it to the Collector of Internal Revenue for the district in which the return is made. Returns will be made on the basis of a fiscal year ending subsequent to January 1, 1917, but where the fiscal year has gone forward, this form should be promptly executed and forwarded. This form need not be prepared by corporations whose net income for the entire fiscal year, as shown by the income-tax return, is not subject to the excess profits tax.

NOTE.—The penalties prescribed for failure to make this return, or for making a false and fraudulent return, are the same as those prescribed for the corresponding income-tax returns.

171

178 Mr. Ellick: Defendants offer in evidence Exhibit number 9, being an amended excess profits tax return filed with the Collector of Internal Revenue at Omaha, September 28, 1917, covering the 11 month period ending June 30, 1917, by the Updike Grain Company.

Mr. Kinsler: The government objects to this offer of evidence for the reason that it is not relevant to the issues, is not competent to prove any issues tendered by the defendants, is immaterial, and for the further specific reason that it appears upon the face of the exhibit that it is an excess profits tax return made in accordance with the provisions of Title II of the Act approved March 3, 1917, and for the further reason that it appears upon the face of the return that it is not a return made in accordance with the provisions and requirements of the Revenue Act of October 3, 1917.

Complainant's objection was overruled by the Court and an exception duly allowed.

Exhibit number 9 was received in evidence over complainant's foregoing objection and is as follows:

No. 25426

TREASURY DEPARTMENT
INTERNAL REVENUE BUREAU

Form 1035

Collection District 37th NEBRASKA
Assessment List SEP 1917
Page 7 Line 18

Audited by

Collector's stamp, showing district and date filed.

This SUPPLEMENTAL INCOME-TAX RETURN is to be filed by all corporations, joint stock companies or associations, and insurance companies having an annual net income in excess of $5,000 and making income tax returns on the basis of a properly established fiscal year ending with the last day of some month in 1917 other than December 31.

IMPORTANT NOTICE.

Before undertaking to insert any figures in the subjoined form, read carefully all instructions given below.

PAID
SEP 29 1917
GEO. L. LOOMIS
Collector

AUDITED

Amended

EXCESS PROFITS TAX

(Title II, Act Approved Mar. 3, 1917.)

NOTE.—In cases wherein no figures are extended insert the word "None."

SUPPLEMENTAL RETURN OF ANNUAL NET INCOME for the fiscal period from Aug 1, 1916 to June 30, 1917.

By The Updike Grain Company Grain
(Name of individual, firm, or corporation) (Kind of business)

located at 625 Omaha Grain Exchange, Omaha Neb
(Street and number) (City or town, and State)

(The address given must be that of the principal place of business as set out in the main income tax return.)

			Cts.
1. Total amount of actual capital invested and used in the business (not including any borrowed money or property), classified as follows:			
(a) Actual cash paid in	$ 700000		
(b) Actual cash value, at the time of payment, of assets other than cash paid in	None		
(c) Paid in or earned surplus and undivided profits used or employed in the business	1400		
Total invested capital		$ 2100	
2. Number of months intervening between January 1, 1917, and closing date of fiscal year		1	(No. of months.)
3. Total net income for full fiscal year as shown on return of annual net income (Forms 1030, 1030A, or 1031) heretofore or herewith filed		$ 23791	
From which deduct—			
(a) Specific exemption	$ 5000		
(b) Eight per cent of total invested capital as set out in item 1	$ 168	1682	
4. Total profits, in excess of exemptions, for full fiscal year		$ 7713	
From which deduct such proportion of such excess profits as the period from the beginning of the fiscal year to January 1, 1917, bears to the full fiscal year			
5. Total "excess profits" apportioned to that part of the fiscal year intervening between January 1, 1917, and the closing date of the fiscal year		$ 1709	
6. Rate at which the tax is computed			.08
7. Total amount of tax assessable		$ 96	
8.	Additional	$ 959	

We, [illegible] President, and [illegible] Treasurer, of the above-named company, being severally sworn, each for himself, deposes and says that the items entered in the foregoing statement are, to the best knowledge and belief, true and correct in each and every particular.

Subscribed and sworn to before me this [illegible] day of [illegible] 1917.

[illegible] President.

[illegible] Treasurer.

SEAL.

[illegible]
(Official capacity)

INSTRUCTIONS

1. Forms 1030, 1030A, and 1031, prescribed for the use of corporations, joint stock companies or associations, and insurance companies in making their returns of annual net income for the purpose of the income tax, having been prepared and distributed prior to the passage of the "Excess Profits" tax law, no provision was made for reporting on those forms the information and data required for the proper assessment of the tax imposed by this law. Hence, this form is intended to supplement the regular income-tax return to which, if received in time, it may be attached; otherwise, when properly verified, it will be transmitted to the Collector of Internal Revenue of the district in which the corporation has its principal place of business. As the regular income-tax forms will be revised to meet the requirements for subsequent years, of both the income tax and the excess profits tax laws, this form will be used this year only, and only by those corporations, joint stock companies, etc., whose regularly established fiscal year ends with the last day of some month subsequent to January 1, 1917, and prior to December 31, 1917.

2. Section 200 of Title II of the act approved March 3, 1917, provides that the first taxable year under this title shall be the year ending December 31, 1917, and the title contemplates that all profits, in excess of the specified exemptions, earned subsequent to January 1, 1917, shall be subject to the tax.

3. Section 201 of this title, in addition to the taxes under existing laws, imposes a tax of 8 per cent annually upon the amount by which the net income of the year exceeds the sum of $5,000 and 8 per cent of the actual capital invested.

4. Section 202 defines actual capital invested as (1) actual cash paid in; (2) the actual cash value, at the time of payment, of assets other than cash paid in; and (3) paid in or earned surplus and undivided profits used or employed in the business, not including borrowed money or property. As represented by (1) and (2), actual capital invested is not necessarily measured by the par value of the stock, but by the amount of cash (1) or by the actual cash value at the time (2) of the tangible assets received by the corporation and for which shares of stock were issued, as represented by (3), the actual capital invested is the amount of the earned or paid-in surplus and undivided profits which stood to the credit of the corporation at the beginning of the year for which the return is made, and which was actually used or employed in the business during the year, that is, the actual capital invested and upon which the 8 per cent exemption is to be computed is the actual capital invested in the business at the beginning of the year, not including any borrowed money or property. If the return is made for a fractional part of the calendar year, that is from January 1, 1917, to the close of a properly established fiscal year, the exemptions will be such proportion of $5,000 and of 8 per cent of the actual capital invested, as the period covered by the return bears to an entire fiscal year—and the above form will be modified to meet such conditions.

5. Section 203 provides that in the case of corporations making returns on the basis of a properly established fiscal year (other than the calendar year) ending with the last day of some month in 1917, the tax imposed by this title shall be assessed on that proportion of the taxable income returned, which the time from January 1, 1917, to the end of the fiscal year, bears to the full fiscal year, the purpose of this provision being to levy the tax on the excess profits, apportioned by the rule outlined, to the period from January 1, 1917, to the end of the fiscal year covered by the income-tax return, which return is made the basis for computing the excess-profits tax.

6. Corporations receiving this form in advance of the preparation of their income-tax returns will prepare and verify it, attach it to the income-tax return, and forward it to the Collector. In cases where the income-tax return made on the basis of a fiscal year ending subsequent to January 1, 1917, has gone forward, this form should be promptly prepared and transmitted to the Collector. This form need not be prepared by corporations whose net income for the entire fiscal year, as shown by the income tax return, is less than $5,000.

NOTE.—The penalties attaching for failure to make this return, or for making a false and fraudulent return, are the same as those prescribed for the same lapses with respect to the income-tax return.

180 GORTON ROTH, recalled as a witness in behalf of the defendants, being examined in chief by Mr. Ellick, testified as follows:

That Exhibit Number 10 is a copy of a letter which witness transmitted to the Collector of Internal Revenue at Omaha on or about the date it bears and that Exhibit Number 11 is the answer of the Collector of Internal Revenue at Omaha to the letter Exhibit Number 10 received by witness.

Mr. Ellick: We offer in evidence Exhibit 10.

Mr. Kinsler: Objected to for the reason that it is not within the issues, not material, not competent and for the further reason that it calls for the Collector's interpretation on the question of either the law or the regulations which would be the best evidence of what the provisions or requirements are.

Complainant's exception was overruled by the Court and an exception duly allowed.

Exhibit 10 was received in evidence over Complainant's foregoing objection and is as follows:

Oct. 2, 1917.

Mr. Geo. W. Loomis,

Collector of Internal Revenue,

Omaha, Neb.

Dear Sir:-

If a corporation is dissolved during the fiscal year, is there any reason why it should make up its final return, or is it sufficient under the dissolution or at the end of the fiscal year?

Yours truly,

The Standard Grain Co.

By

AC

183 Mr. Ellick: We offer in evidence Exhibit 11 which is the answer of the Collector to the letter, Exhibit 10.

Mr. Kinsler: Objected to for the reason that it is not within the issues, not material, not competent and for the further reason that it calls for the Collector's interpretation on the question of either the law or the regulations, which would be the best evidence of what the requirements and provisions are.

Complainant's objection was overruled by the Court and exception duly allowed.

Exhibit 11 was received in evidence over complainant's foregoing objection and is as follows:

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OMAHA, NEBR.

C/11

October 3rd, 1917.

Updike Grain Company,
Omaha.
Nebraska.

Gentlemen:

Replying to your letter of October 2nd, you are informed that when a corporation dissolves, it should make a final return and file with the return evidence that the corporation has been dissolved.

The final return is due within sixty days from the end of the fiscal year. It may be filed sooner.

Respectfully,

Geo L Looms

Collector.

EWM-K.

GENERAL
15996

October 27, 1917.

EPT-CVH

Joseph & Alvin T. Sapinsky,
135 Broadway,
New York City.

Gentlemen:

This office is in receipt of your letter of the 26th instant, in which you ask whether a New York corporation which was dissolved in June, 1917, is liable for additional income or excess profits tax under the Act approved October 3, 1917, or whether it is liable only for the tax imposed by the law in existence at the time of its dissolution.

In reply, you are informed that the corporation which was dissolved in June, 1917, is subject to tax under the Act of September 8, 1916 and under the Act of March 3, 1917. It will not be subject to the taxes imposed by the Act of October 3, 1917, for the reason that the Government can not revive a dead corporation in order to assess taxes which are imposed by laws enacted subsequent to the dissolution of the corporation. The corporation, in making its return for the

year 1917 should also file a return on Form 1065 for excess profits tax, such return to be prepared under the provisions of the Act of March 3, 1917.

Respectfully,

L. F. SPEER

Deputy Commissioner.

BKH

The attention of witness was next called to Exhibit 13 and he was asked to state what that exhibit is, to which he answered "A letter that was sent from our office to the Collector of Internal Revenue at Omaha on December 18, 1917 by messenger."

Mr. Ellick: We offer in evidence Exhibit 13.

Mr. Kinsler: Objected to for the reason that it is not relevant to the issues, wholly immaterial, not tending to prove any issue tendered by the defendants.

Complainant's objection was overruled by the Court and exception duly allowed.

Exhibit 13 being received in evidence over complainant's foregoing objection is as follows:

Dec. 18, 1917.

Mr. Geo. .. Loomis,
Collector of Internal Revenue,
Omaha, Nebr.

Dear Sir:-

Please send me supplemental blanks for account of the following:-

Carbon Coal & Supply Co.
Updike Elevator Co.
Missouri Valley Elevator Co.
E. Stoakham Grain Co.
Milligan Grain Co.
Hynes Elevator Co.
The Updike Grain Co.

Yours truly,

HC

189 Mr. Ellick stated "it is admitted that Exhibit 14 pages 1 & 2 is a photostat copy of the Return of the Updike Grain Company designated 'final report', covering the period from July 1, 1917, to August 28, 1917, filed with the Collector of Internal Revenue at Omaha on January 29, 1918, with the affidavit attached."

Mr. Ellick: We offer in evidence Exhibit 14 pages 1 & 2 photostatic copy of a return of the Updike Grain Company designated "Final report", covering the period from July 1, 1917, to August 28, 1917, filed with the Collector of Internal Revenue at Omaha, on January 29, 1918, with the affidavit attached. We offer pages 1 and 2 with all the endorsements thereon and all notations.

Mr. Kinsler: The offer is objected to for the reason that the exhibit offered is not within the issues of this case, it is not material and it is not competent to prove any issue in the case, and for the further reason that it appears upon the face of the return that it is a return of net annual income under Title I, Parts 2 and 3 of the Act of September 8, 1916, and covers a period from July 1, 1917 to August 28, 1917, and for the further reason that it appears upon the face of this return that it is not a return which is made in accordance with the provisions and requirements of the Revenue Act of October 3, 1917, or of Article 61 of Regulations 33 revised, or Article 10 of Regulations 41 of the Treasury Department. And for the further reason that it does not cover the taxable period in question, and for the further reason that it appears to be on the face of it, a final report made in accordance with the provisions and requirements of the Act of September 8, 1916, and of Article 80 of Regulations 33, that is,
190 the original Regulations 33 which were applicable to the Act of October 3, 1913, and the Act of September 8, 1916, but not applicable in any way to the Act of October 3, 1917. And for the further reason that it appears upon the face of this return that it is a return showing no income of any kind during the period covered by the return.

Complainant's objection was overruled by the Court and exception duly allowed.

Exhibit 14 was received in evidence over complainant's foregoing objection and is as follows:

Mar 27 1918

INTERNAL REVENUE BUREAU.

RECEIVED
JAN 29 1918
COLLECTOR'S OFFICE

Certificate of Dissolution Attached

INCOME TAX.

THE PENALTY

FOR FAILURE TO MAKE THIS RETURN [illegible]

RETURN OF ANNUAL NET INCOME.

(Title I, Parts II and III, of the Act of September 8, 1916.)

CORPORATIONS

(OTHER THAN INSURANCE COMPANIES.)

Above space to be stamped by Collector, showing district and date filed.

RETURN OF NET INCOME for the Calendar / Fiscal year ending December 31st 1917

by The Upshur Grain Company

(Name of corporation, joint-stock company, or association.)

and located at Omaha Grain Exchange Omaha Nebraska

(Street and number.) (City or town.)

(The address given must be that of the principal place of business of the corporation.)

If no figures are to be entered opposite any item in the return, the word "None" should be inserted.

1. Total amount of paid-up capital stock outstanding at the close of the year, or if no capital stock, the capital, other than interest-bearing indebtedness, employed in the business at the close of the year	$	2000000 00
2. Total amount of bonded and other interest-bearing indebtedness outstanding at close of year, exclusive of indebtedness wholly secured by collateral, the subject of sale or hypothecation in ordinary business of the corporation	$	645 [illegible] 91

3. GROSS INCOME:	Dollars.	Cts.	DEDUCTIONS.	Dollars.	Cts.
(a) From operations	$ 10 54[illegible]	05	4. (a) Expenses, general	$ 79 815 [illegible]	
(b) From rentals	316	25	(b) Payments in lieu of rent	None	
(c) From interest	24 396	44	5. (a) Losses sustained charged off	11 77[illegible]	
(d) From dividends received	40	52	(b) Depreciation charged off	None	
(e) From other sources	21 947	36	(c) Depletion charged off	None	
Total gross income	$ 57 [illegible]	64	6. (a) Interest paid (see Note 6a)	7610	31
Total deductions	100 [illegible]	65	(b) Interest paid by banks on deposits	None	
8. Net income	$ None		7. (a) Taxes, domestic paid	1430	50
9. Tax assessable at 2%	$		(b) Taxes, foreign paid	None	
10.	$		Total deductions	$ 100 [illegible]	65
Total	$				

W. P. Upshur, President, and Morton Roth, Secretary, of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me this twenty-fifth day of January, 1918.

D. J. White
Notary Public.

(Official capacity.)

Seal of officer before whom affidavit is taken.

W. P. Upshur
President.

Morton Roth
Secretary.

GENERAL INSTRUCTIONS.

Time of filing returns.—Returns made on the basis of a calendar year must be filed on or before March 1 with the Collector of Internal Revenue of the district in which is located the principal place of business of the corporation, if made on the basis of a FISCAL YEAR* they must be filed within 60 days after the close of such year.

*Fiscal year.—Corporations keeping their books of account and making returns of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to March 1 of the year in which the return would [illegible] the calendar year basis, file with the Collector a notice in writing designating the last day of some month as the close of each fiscal year. A return [illegible] the calendar year ending with the date designated as the close of the fiscal year must be filed on or before the first day of March of the next calendar year, or [illegible] year the return must be filed within 60 days after the closing date of the fiscal year as established.

Extension of time.—In the case of neglect to file [illegible] ge as provided here, the Collector is authorized to grant an extension of the filing period not exceeding 30 days from the normal due date, provided such neglect [illegible] to sickness and provided an application for such extension is made in writing prior to the expiration of the time as to which extension may be granted. [illegible] cases the Commissioner is authorized to grant such further extension as he may deem proper.

Signatures and verification.—Returns must be signed and sworn to by the officers of the corporation, that is, by the president, vice president, or other principal officer, and the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Subsidiary companies.—The corporation making this return should attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. Each subsidiary company must make a separate and distinct return.

Foreign corporations.—Foreign corporations subject to the law are required to make returns to the Collector of the District in which is located the principal place of business or agency through which is transacted the business in the United States, or if the corporation has no place of business or agency in the United States, its return shall be filed with the Collector of Internal Revenue at Baltimore, Maryland. The gross income to be returned is that received from business transacted and capital invested in the United States, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including income derived from dividends on capital stock of [illegible] net earnings of resident corporations, joint-stock companies, or associations whose net income is taxable under this law. The deductions allowed are those losses and indebtedness incident and necessary to the transaction of the business in this country, all as specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business done or capital invested in the United States. In the case of a foreign corporation having no place of business or agency in the United States and no return is made, the tax on income from interest and dividends will be withheld at the source.

Penalties.—Corporations refusing or neglecting to file returns within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding $10,000, and an additional tax of 50 per cent in case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return, will be added to the assessment; provided in case of delinquency, if the return is voluntarily filed without notice from the Collector, and it is shown that delay in filing was due to reasonable cause and not to willful neglect, the 50 per cent additional tax will not be assessed.

Any officer of any corporation required by law to make, render, sign, or verify any return, who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

SUPPLEMENTARY STATEMENT.

The following information must be furnished by every corporation, joint-stock company, or association, without which the return will not be accepted as complete. The items herein relate to the items listed in the above return form and bear corresponding numbers, and the totals set out in the above return must agree with the totals hereinafter set out.

1. PAID-UP CAPITAL STOCK.

Unissued or treasury stock should not be included in this item, but only such stock as has been actually issued and is outstanding at the close of the year and for which payment has been received. Where the stock issued is payable in installments or assessments, only so much of it as has been actually paid in upon such installments or assessments should be reported.

If no capital stock is issued or if the capital stock is issued without par value, the amount of capital invested in the business at the close of the year, not including borrowed capital, will be entered under this item.

(a) Par value of common stock	$ 2000000 00
(b) Par value of preferred stock	$ None
Total paid-up stock	$ 2000000 00

2. INDEBTEDNESS.

All interest-bearing indebtedness, for the payment of which the corporation or its property is bound, should be reported below. In the case of banking corporations and like financial institutions, deposits should not be reported as indebtedness. Indebtedness wholly secured by collateral, the subject of sale or hypothecation in the ordinary business of the corporation, should be reported here, but such indebtedness must not be entered under Item 2 below nor be considered in determining the amount of interest deductible under Item 6 (a).

Character of obligation.	Rate of interest.	Amount.
Bills Payable	Various	645 [illegible] 91
Total indebtedness		645 [illegible] 91

5. (Gross Income):

All manufacturing, merchandising, or other corporations which determine their capital gain or loss by reference to inventories should in every case in the form indicated below, or in a similar form, show the method employed and submit in detail the items going into the computation. In case the amount given as cost of goods sold is determined by inventory, the inventory must be presented at the cost price, or at cost or market, whichever is lower, and the basis of valuation must be stated in detail. Any change in the basis of valuation of the inventory at the end of the year from that used at the beginning of the year must be explained.

(a) Inventories:

Kind of goods.		
Inventory at beginning of year (or at time of first return)	$ 3,000 [illegible]	
Purchases	[illegible]	$ 316,177.16
Inventory during year (or at time of beginning of year)	$ 9,000 [illegible]	
Total		$ 314,177.16
* Total sale or less (Item 2 (a)), first page		$ 10,000 [illegible]

In the case of manufacturing corporations, "Purchases during the year" will include the cost of goods "finished" or "fabricated," and "wages" as have not been separately deducted under any item of the return.

Overhead charges should not be included in inventory (see Item 4).

*(If inventory shows loss, make entry in red ink or strike out "gain.")

If inventory is not used, state below method of determining gain or loss from operations:

In case of the sale of capital assets acquired prior to March 1, 1913, the profit or income to be returned will be the difference between the fair market value of such assets as of March 1, 1913, and the price at which they are sold. If acquired subsequent to March 1, 1913, then the profit or income to be returned is the difference between the cost and the selling price.

In the case of the sale of assets acquired prior to March 1, 1913, state—

(1) Original cost of assets ..... $.....

(2) Fair market price or value as of March 1, 1913. .....

(3) Price at which assets were sold ....

State how fair market price or value as of March 1, 1913, was determined:

(b) From Rentals:

Rentals to be reported as income will include all payments received in cash or its equivalent as rent on buildings or other property owned by the corporation making the return, as well as all royalties received.

(c) From Interest:

Interest to be reported as income includes all interest received on bonds or securities owned by the corporation with the exception of interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions, which latter interest for the purpose of information should be extended below:

U. S., STATE, AND OTHER OBLIGATIONS.

Kind of obligation.	Amount of principal.	Rate.	Amount of interest received.
Bills Receivable	Various	Various	$ 24396.40
Total			$ 24396.40

(d) Dividends:

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned by the receiving corporation as income of the year in which the distribution was made or ordered to be made. Such dividends must be returned to the amount of their cash value and such cash value is held to be the proportional share of the surplus accrued to the paying corporation since March 1, 1913, as so represented by the stock distributed or ordered to be distributed to the receiving corporation.

(e) From Other Sources:

All other sources from which income has been received, and the amount thereof, should be itemized below:

Commissions	$	15,699.36
Sale of Stations		6.72
Total	$	15,706.08

4. Expenses, General:

This item should include only the ordinary and necessary expenses paid within the year in the maintenance and operation of the business and properties of the corporation, itemized as per schedule below, and will not include any disbursements the deduction of which is specially provided for in the return form proper on the obverse side of this form.

Interest paid on indebtedness wholly secured by property collateral the subject of sale or hypothecation in the ordinary business of the corporation as a dealer only in the property constituting such collateral or in the loaning of funds thereby produced, is an allowable deduction as a business expense to an amount of the interest paid on such indebtedness not in excess of the actual value of the collateral securing it.

All expenses of material, labor, fuel, and other items entering into the cost of goods purchased, sold, or inventoried are deductible under this head as expense, provided such items have not been considered in determining the cost or purchases during the year when the income derived from operations is ascertained through an inventory as set out in Item 3 (a) of this statement.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation allowances.

Payments made to officers or employees who are stockholders, which payments are made in the guise of salaries or compensation and the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

(a) Labor, wages, commissions, etc.	$	44,196.66
2. Fuel, light, power, etc.		1,665.17
3. Rents (ordinary)		11,597.67
4. Repairs, ordinary and incidental		2,990.71
5. Interest on indebtedness wholly secured by collateral the subject of sale, etc.		497.31
6. Taxes, Postage, Telegr & Telegh		1,626.24
Exchange		9.71
Miscellaneous		7.16
7. Other expenditures—Charity		3,976.62
Legal Expenses		1,416.84
Travelling Expenses		5,519.13
Miscellaneous		79,815.72
Total expenses	$	

8. (a) Names of officers and employees to whom salaries of $3,000 or more were paid during the year and amount paid to each. (If the space below is not adequate, a list marked "Item 4 (8)" containing this information should be attached to this form.)

Name.	Address.	Amount.
Total		$

Where sufficient space is not provided for the entry of the information required in the "Supplementary Statement," lists containing full information in the form indicated, should be marked in accordance with the particular item and attached to this form.

Corporations failing to [illegible] schedule of [illegible] are required to withhold the normal tax of 1 per cent [illegible] such interest, or such portion thereof as may be [illegible] to withhold at the rate of 1 per cent [illegible] and pay the same to the Collector [illegible] and all other persons of $1,000 or more [illegible] such interest, and pay the same to the Collector [illegible]

(b) Insurance as a set-off:

Policy insurance on the life of officers or employees may be considered as a set-off against interest paid on indebtedness, only to the extent that the premiums paid during the year on such policies do not exceed the interest accrued during the year on the amount due on the policies, less any dividends received or credited during the year on such policies. Where the premiums paid during the year exceed the interest accrued during the year on the amount due on the policies, less any dividends received or credited during the year on such policies, the amount of such excess may be deducted from the gross income. Where the interest accrued during the year on the amount due on the policies, less any dividends received or credited during the year on such policies, exceeds the premiums paid during the year on such policies, the amount of such excess must be added to the gross income.

5. (a) Losses:

Losses sustained during the year must be itemized. Any corporation claiming a deduction for losses sustained during the year must set forth in detail the nature of each loss, the time when sustained, the cause thereof, and the disposition made of property after the loss was sustained. If the losses claimed were sustained in the sale of capital assets acquired prior to March 1, 1913, the profit or income to be returned is the difference between the cost and the selling price. In the case of the sale of assets acquired prior to March 1, 1913, state the original cost, the fair market price or value as of March 1, 1913, and the price at which sold. State also how the fair market price or value as of March 1, 1913, was determined.

Kind of asset.	Original cost.	Date acquired.	Amount charged off.
Personal [illegible]	$ 11,722.46	Sept 07	$ 10,722.46
Total			$ 11,722.46

When were the deducted items charged off to reserve? August 1917

How were they so ascertained? Last Audited Statement [illegible]

In case of losses resulting from the sale of capital assets acquired prior to March 1, 1913, state—

(1) Original cost of assets ..... $.....

(2) Fair market price or value as of March 1, 1913. .....

(3) Loss resulting from such sale ....

State also how the fair market price or value as of March 1, 1913, was ascertained:

(b) Depreciation:

The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years the same will last. Stocks, bonds, and like securities, as well as any other property not subject to exhaustion, wear and tear within the meaning of the law. Should not be the amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or loss.

Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction, since any loss due to the shrinkage in the saleable value of the merchandise will be reflected in the sales when the merchandise is disposed of.

Kind of property.	Its cost.	Probable life after acquirement.	Amount of depreciation. This year.	Amount of depreciation. Previous years.
Totals	$		$	$

If buildings, state kind of construction.

(c) Depletion:

Depletion applies to the exhaustion of natural deposits, and contemplates a deduction to return to the corporation the capital invested, or the value thereof as of March 1, 1913, an amount sufficient to return to the corporation the fair market value of such deposits as of that date. An allowable deduction on account of depletion must be computed upon the fair market value in the mine of the product thereof mined and sold during the year, and not upon the quantity mined and sold, and must be computed upon the basis of the decline in the settled flow. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property.	Its cost if acquired subsequent to March 1, 1913.	†Fair market value as of March 1, 1913.	Amount of depletion. This year.	Amount of depletion. All years to date.
	$	$	$	$

*Coal, iron ore, copper, oil, or gas.

†State how fair market value as of March 1, 1913, was determined.

6. (a) Interest Deductible:

The amount of interest deductible under this Item is the amount actually paid within the year on an amount of bonded or other indebtedness not in excess of the paid-up capital stock outstanding at the close of the year, or if no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is not in excess of the needs of the business, but does not include any borrowed capital or interest bearing indebtedness.

Interest, so called, or dividends paid upon preferred capital stock, is not deductible.

Interest deductible under this Item includes all interest actually paid within the year and in excess of the limit hereinbefore indicated on any debt for which the corporation or any property in which it has title, interest, or equity is pledged, except interest on indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company, etc., which interest is deductible under Item 4 (a) as a business expense.

INTEREST PAYMENTS ACTUALLY MADE DURING YEAR.

All forms of indebtedness upon which interest was paid should be listed here.

Name or kind of obligation.	Amount of principal.	Rate of interest.	Amount of interest paid.
Bills Payable	Various	Various	$ 761.43
Total			$ 761.43

(b) Interest Paid on Deposits:

Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, loan or trust company is deductible to the entire amount so paid.

7. (a) Taxes—Federal Income Excess Profits

(b) Taxes—Foreign:

Taxes deductible under these Items are such taxes as are imposed by the United States, by any State or Territory, or by any political subdivision thereof, or by the Government of any foreign country, and are actually paid or accrued on the books of the corporation, and in excess of the amount due and payable within the year for which the return is made, except that taxes imposed under the laws of a foreign Government are not deductible from the income arising and accruing to a foreign corporation by reason of the business transacted or capital invested in this country, and except that taxes paid for local benefits or taxes paid by corporations pursuant to covenants guaranteeing their bonds to be tax free, are not deductible.

Taxes paid by banks or other corporations on the value of their capital stock outstanding and in the hands of stockholders are not deductible. Such taxes are a primary liability of the stockholders, as such chargeable against their income.

State whether or not this return is made on the basis of actual receipts and disbursements.

If not, describe fully what other basis or method was used in computing net income.

STATE OF NEBRASKA,)
) ss.
COUNTY OF DOUGLAS)

Gerton Roth, being first duly sworn, deposes and says: On and prior to the 28th day of August, 1917, I was the duly elected, qualified and acting Secretary of the Updike Grain Company, and as such Secretary had in my possession all the books, records, corporate seal and charter of the Updike Grain Company.

In the month of August, 1917, the stockholders of the Updike Grain Company, by resolutions duly adopted, voted for and ordered the dissolution of the Updike Grain Company, and the distribution of all of the assets of the corporation among the stockholders. This action of the stockholders had theretofore been authorized by the Board of directors of said corporation at a meeting held on the 18th day of August, 1917.

In pursuance of this action by the Board of Directors and the stockholders, all outstanding stock in the Updike Grain Company was surrendered and cancelled, the assets of the corporation were distributed among the stockholders, and a certificate evidencing such dissolution was filed with the Secretary of State of the State of Nebraska on the 28th day of August, 1917.

Since that date said corporation has transacted no business, nor in any manner exercised any of the powers, privileges or franchises as a corporation under the laws of the State of Nebraska.

Gerton Roth

SUBSCRIBED in my presence, and sworn to before me this 24th day of January, 1918.

D. J. White
Notary Public.

[redacted]

Copy

File

April 2, 1919.

S

Honorable Daniel J. Riordan,
House of Representatives,
Washington, D. C.

My dear Mr. Riordan:

Reference is made to the brief and the statement of facts relative to the dissolution of the Updike Grain Company, Omaha, Nebraska, which were recently left by you in this office.

It is contended in the brief that the Updike Grain Company, a corporation organized under the laws of the State of Nebraska, whose property of every description was sold (the proceeds being distributed among the stockholders), and the corporation duly dissolved in 1917, prior to the passage of the Act of October 3, 1917, no one succeeding to the business of the corporation or becoming by agreement liable for its liabilities is not liable for income and excess profits taxes imposed by that Act.

In this connection you are advised that the provisions of the war income tax and the war excess profits tax apply to income for the entire calendar year 1917, although the Act imposing them was not passed until October 3, 1917. To that extent it is retroactive. Similarly, the Income Tax Laws, Act of October 3, 1913, and Act of September 8, 1916, were retroactive. This is not constitutionally objectionable. (Brushaber v. Union Pacific R. R. Co., 214 U. S. 1). The effect is the same so far as income for the year 1917 is concerned, as if the Act had been passed on January 1, 1917. On this principle of construction, the Act of October 3, 1913, was held in Brady v. Anderson, 240 Fed. 668, to impose a tax upon the income of an individual who died during the period for which the tax was assessed, but before the passage of the Act. Article 61 of Regulations 33 (Revised) which is based upon this principle provides as follows:

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in 1917, prior to passage of the war revenue act of October 3, 1917, is subject to tax under the Act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the Act of October 3, 1917 (Brady et al. v. Anderson, 240 Fed., 665). A corporation so situated will make a return on revised Form 1001, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have paid any excess profits tax under the Act of March 3, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the Act of October 3, 1917."

With regard to the contention that Article 61 of Regulations 33 (Revised) does not apply in the case of the Updike Grain Company for the reason that the corporation had no successor or representative against whom the liability for taxes could be enforced, you are advised that a corporation cannot as against its creditors give away its assets to its stockholders. Its assets are a primary fund for the payment of its debts (Stone v. Virgin, 66 Mass. 216, Stedman v. Eveleth, 47 Mass. 114, Tanger v. Upton, 91 . . . 60). The dissolution of a corporation does not impair its obligations, its assets remaining a trust fund or pledge for the payment of its creditors. Taxes are a liability and are prior in right to all claims except judicial costs (103 Fed. 158). The taxes due from a corporation are legally collectible from the stockholders, or others who received its assets upon its liquidation and dissolution (Op. of Att. Gen. 241, Star Dollar Savings Bank v. United States 11 Wallace 567, 240, (U. S. D. 1918).

It is held therefore that the Updike Grain Company, a corporation organized under the laws of the State of Nebraska, which sold its property and distributed its assets among its stockholders and was duly dissolved in 1917, prior to October 3, 1917, is liable to the income

and excess profits taxes imposed by the Act of October 3, 1917.

Sincerely yours,

Roper

Commissioner.

IT:T:EB
BB
MAP

B.B. n 18 Inv. Ale 49 Dist.

602

198 Memorandum: Pursuant to an order of the trial court written interrogatories were propounded by defendants under Equity Rule 58 to D. H. Blair, Commissioner of Internal Revenue; T. F. Langley, Chief of Proving Section Income Tax Unit, Bureau of Internal Revenue; James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska; and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska.

Subsequently pursuant to an order of the trial court additional written interrogatories were propounded by defendants under Equity Rule 58 to D. H. Blair, Commissioner of Internal Revenue; James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska; and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska.

Answers to the original and supplemental interrogatories were duly made under oath by the respective officers interrogated and all questions and answers are in the files of this suit in the office of the clerk of the Court.

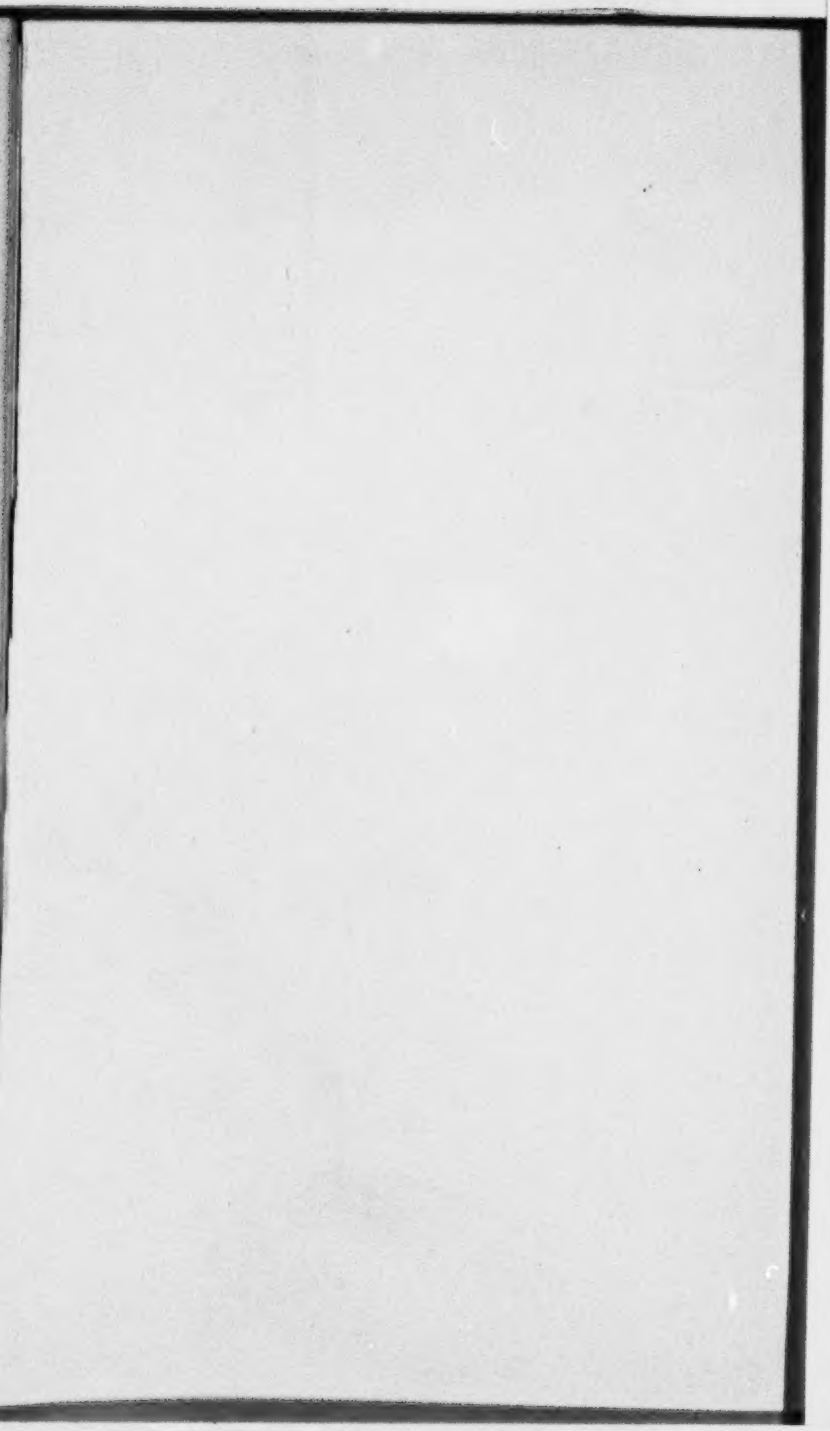
"Mr. Kinsler: We have no objection, your honor, to letting all of the interrogatories go in with all the answers. We will shorten it right up that way. All the interrogatories and all of the answers, both the original interrogatories and the supplemental interrogatories, original answers and supplemental answers and have everything before the court."

Mr. Ellick: I offer in evidence of the original interrogatories Questions, 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 45, 54, 55, 56, 58, 61, 62, 63, 64, and 69 and the answers of David H. Blair, Commissioner of Internal Revenue, to those interrogatories.

The foregoing interrogatories offered in evidence by the defendants, together with the answers thereto, and documents and exhibits therein referred to were received
199 without objection and are as follows:

D. H. Blair, Commissioner of Internal Revenue, answering Interrogatories 1 and 2:

I have in my possession or under my control the original income tax return of the Updike Grain Company of Omaha, Nebraska, for the fiscal year ending June 30, 1917, subscribed July 24, 1917 and filed July 25, 1917. Said return was received in the office of the Commissioner of Internal Revenue August 4, 1917; a photostat copy is hereto attached. (Pho-



tostat copy referred to is same as Exhibit 7 already received in evidence).

Answer to Interrogatory Number 3:

No assessment of income, war income or excess profits taxes was endorsed upon said return. A notation was made upon said return indicating that an additional tax in the sum of $373,911.54 for the eleven months' period ended June 30, 1917, had been determined to be due from Updike Grain Company and should be assessed.

Answer to Interrogatory Number 4:

No assessment endorsed upon said return as explained in answer to Interrogatory Number 3.

Answer to Interrogatory Number 5:

The amount of additional tax noted upon said return was computed and determined by the Corporation Audit Division of the Income Tax Unit; the determination being first made by an auditor of said division, based upon a report received from the Revenue Agent in Charge, at Omaha, Nebraska, under date of October 26, 1918, and a supplemental report from the same source dated June 30, 1919, and thereafter approved by the Head of said division.

Answer to Interrogatory Number 7:

200 There was no assessment of additional income and excess profits taxes endorsed upon said return. Upon the determination by the Corporation Audit Division of the amount of additional tax due from Updike Grain Company, as above stated, a rubber stamp impression was made upon the return of the words "Assessment", "Taxes", "Penalty", "Basis", "Date", "Page", and "Line" with appropriate blanks to be filled indicating the amount of the tax to be assessed (and the penalty, if any), together with the basis thereof, the date of assessment, and the page and line of the assessment list on which the tax would later appear.

Concurrently with the making of said rubber stamp impression, the amount of the proposed assessment, to-wit: $373,911.54, was inserted in the blank space opposite the word "Tax", also the letters and figures "RAR 6-30-1919" were inserted, indicating that the proposed assessment was based upon a Revenue Agent's report of June 30, 1919. Thereafter the Corporation Audit Division transmitted the return, together with a summary sheet showing the additional assessment to be made to the Proving Section of the

Income Tax Unit, where the additional assessment list and Commissioner's certificate were prepared. Said additional tax appeared upon the January, 1920 additional income tax assessment list, page 14, line 1. Said list was signed by J. H. Callan, Acting Commissioner of Internal Revenue, under date of January 27, 1920.

Thereafter, the words and figures "January 1920, 14-1" were placed upon the return in the blank spaces above mentioned, indicating that the additional tax had been assessed upon the January, 1920 list on page 14 at line 1.

The aforesaid rubber stamp impression upon said return, including the notation made in connection therewith, are no part of the assessment of said additional tax, but the same is simply a memorandum placed upon the return for the information and guidance of persons connected with the Bureau of Internal Revenue; first, that an assessment of additional tax was proposed to be made, and second, when the blank spaces following the words "Date", "Page", and "Line" were filled in, that the additional tax had been assessed.

The said additional tax of $373,911.54 is a tax imposed upon the Updike Grain Company by the Revenue Act of October 3, 1917. The "return" referred to in this answer is the return which, as appears on its face, was made and filed by Updike Grain Company pursuant to the provisions of the Revenue Act of September 8, 1916.

Answer to Interrogatory Number 8.

The aforesaid assessment was not endorsed upon said return. The computation, determination and assessment of said tax, was made according to the customary procedure prevailing in the Income Tax Unit.

Answer to Interrogatory Number 9.

This case was handled the same as all other cases of a similar character.

Answer to Interrogatory Number 10.

As noted above no assessment was endorsed upon the return. The memorandum of amount of tax to be assessed was placed upon the return in the Corporation Audit Division of the Income Tax Unit. There is no record of the name of the particular auditor who made said notation.

Answer to Interrogatory Number 11.

As previously stated there was no assessment endorsed upon the aforesaid income tax return. The procedure, above mentioned, in assessing the additional tax against
202 Updike Grain Company, was in accordance with the custom and practice prevailing in the office of the Commissioner of Internal Revenue respecting the assessment of additional income and war profits taxes.

Answer to Interrogatory Number 13.

As heretofore stated, no assessment was ever endorsed upon any income tax return, although as explained in detail above, it was the practice of the Audit Division, when it determined that there was an additional tax due from a taxpayer, to note the amount to be assessed, upon a return filed by the taxpayer for the taxable year in question.

Answer to Interrogatory Number 15.

Assessment lists were made from time to time during the years 1919 and 1920 upon which it was the practice to enter assessments of additional income and excess profits taxes found to be due from taxpayers for the year 1917 or for fiscal years ended during 1917.

Answer to Interrogatory Number 16.

As heretofore stated no assessment was endorsed upon any return but after a notation of the tax to be assessed was placed upon a return by the Audit Division, such return, together with a summary sheet prepared by the Audit Division (which is merely a memorandum showing the names of taxpayers and amounts to be assessed), was forwarded to Proving Section of the Income Tax Unit, where the assessment lists are prepared in duplicate for the signature of the Commissioner of Internal Revenue. After being signed in duplicate by the Commissioner of Internal Revenue, one copy of said list is retained in the office of the Commissioner and the other copy forwarded to the Collector of Internal Revenue.

Answer to Interrogatory Number 17.

203 The assessment of $373,911.54 additional income and excess profits taxes against the Updike Grain Company for the eleven months' period ended June 30, 1917, was assessed upon January, 1920 additional income tax assessment list, page 14, line 1. The Commissioner's certificate attached

to said list was signed by J. H. Callan, Acting Commissioner of Internal Revenue, under date of January 27, 1920.

Answer to Interrogatory Number 18.

A photostat copy of the Commissioner's certificate and additional assessment list above mentioned are attached hereto.

TAX LIST REPORT

ADDITIONAL ASSESSMENTS.

ASKA List: INCOME TAX (Kind of tax.) JANAURY 1920 (Month or section.) Dated

ER OF INTERNAL REVENUE:

hat the following transactions affecting the tax list described above have been recorded on my books this month:

....., Collector.

TAXES COLLECTIBLE		AMOUNTS	✓	FOR COMMISSIONER'S OFFICE
ward from last report		$		$
month				
made by Collector (increases)				
nissioner { Form 23 D, dated	$			
nissioner { Form 23 A, dated	$			429 974 31
Districts { (District.)	$			
Districts { (District.)	$			
Districts { (District.)	$			
rged to taxpayers' accounts)				
rged { Paid by Collector, per abstract	$			
nts). { Certified to Commissioner for payment, per abstract	$			
be accounted for				429 974 31
stricts { (District.)	$			
stricts { (District.)	$			
stricts { (District.)	$			
{ By order of Commissioner	$			
{ By Collector, per abstract	$			
Taxes Collectible at close of month		$		$
ABATEMENT CLAIMS PENDING				
ward from last report		$		$
d during month				
be accounted for				
llowed during month (see Item 11)				
ected during month { By order of Commissioner	$			
ected during month { By Collector	$			
abatement claims pending		$		$

COMMISSIONER'S CERTIFICATE

t I have made inquiries, determinations, and assessments of the taxes, penalties, etc., of the above classification specified in this nts of taxes, penalties, etc., stated, as corrected by the statement of differences, are due from the individuals, firms, and corpora- s such amounts are placed and that the amount chargeable to the Collector is as follows:

	TOTAL DEBITS	TOTAL CREDITS	BALANCE
	$ 429 974 31	$	$ 429 974 31

Approved by the Comptroller of the Treasury
July 24, 1919

TAX LIST REPORT
ADDITIONAL ASSESSMENTS.

District: NEBRASKA List: INCOME TAX (Kind of tax.) JANUARY (Month or period)

TO THE COMMISSIONER OF INTERNAL REVENUE:

I hereby certify that the following transactions affecting the tax list described above have been re

LINE NO.	TAXES COLLECTIBLE		A
1	Balance brought forward from last report		$
2	Returns filed during month		
3	Revisions in returns made by Collector (increases)		
4	Received from Commissioner { Form 23 D, dated / Form 23 A, dated }	$ / $	
5	Transfers from other Districts { (District.) / (District.) / (District.) }	$ / $ / $	
6	Returned checks (charged to taxpayers' accounts)		
7	Refund vouchers (charged to taxpayers' accounts). { Paid by Collector, per abstract / Certified to Commissioner for payment, per abstract }	$ / $	
8	Total to be accounted for		
9	Collections		
10	Transfers to other Districts { (District.) / (District.) / (District.) }	$ / $ / $	
11	Abated during month { By order of Commissioner / By Collector, per abstract }	$ / $	
12	Balance of Taxes Collectible at close of month		$
	ABATEMENT CLAIMS PENDING		
13	Balance brought forward from last report		$
14	Abatement claims filed during month		
15	Total to be accounted for		
16	Abatement claims allowed during month (see Item 11)		
17	Abatement claims rejected during month { By order of Commissioner / By Collector }	$ / $	
18	Balance of abatement claims pending		$

COMMISSIONER'S CERTIFICATE

I HEREBY CERTIFY that I have made inquiries, determinations, and assessments of the taxes, penalties, etc., c list and find that the amounts of taxes, penalties, etc., stated, as corrected by the statement of differences, are du tions opposite whose names such amounts are placed and that the amount chargeable to the Collector is as fo

	TOTAL DEBITS	
As reported by Collector	$ 429 [illegible] 31	$
As audited by Commissioner		
Items allowed on Form 23 D, No.		

UNITED STATES INTERNAL REVENUE

ASSESSMENT LIST

District NEBRASKA

INCOME TAX

(Classification)

	NAME AND ADDRESS OF TAXPAYER	DESCRIPTION OF ITEM	TOTAL TAX	DATE PAID
0	UPDIKE GRAIN CO. 625 OMAHA GRAIN EXCHANGE, OMAHA, NEBR.	—		
1	" "	6/30/17 11 M08.39500995 R.A.R.6/30/19	373 911 54	
2				
3				
4				
5				
6				

UNITED STATES INTERNAL REVENUE

ASSESSMENT LIST

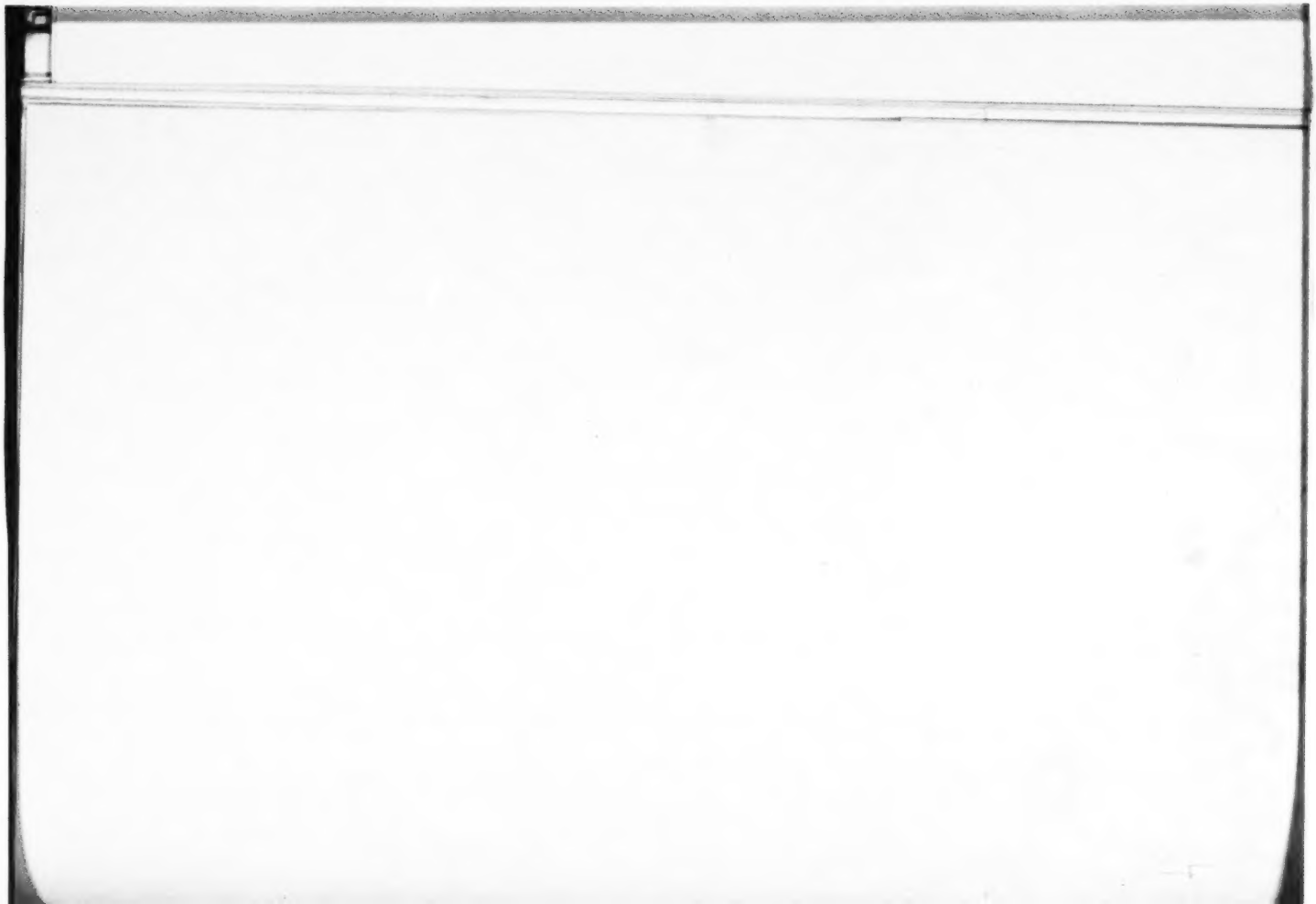
SKA

INCOME TAX

(Classification)

List JANUARY 1920

ADDRESS OF TAXPAYER	DESCRIPTION OF ITEM	TOTAL TAX	DATE PAID	REMARKS
CO. AIN EXCHANGE,	— —			—
	6/30/17 11 MOS. 39500995 R.A.R. 6/30/19	373 911 54		



VOLUME II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 340

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NELSON B. UPDIKE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

(34471)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 8241

UNITED STATES OF AMERICA, APPELLANT,

vs.

NELSON B. UPDIKE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 23, 1928.

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206 Answer to Interrogatory Number 23.

I have in my possession or under my control the original excess profits tax return of Updike Grain Company of Omaha, Nebraska, for the fiscal period ending June 30, 1917, subscribed August 29, 1917, and filed with the Collector of Internal Revenue at Omaha, Nebraska, on or about August 30, 1917. This is the excess profits tax return filed by Updike Grain Company under the Act of March 3, 1917.

Answer to Interrogatory Number 24.

Said return was received in the office of the Commissioner of Internal Revenue August 11, 1917. A photostat copy of the same is hereto attached. (Photostat copy referred to is same as Exhibit 8 already received in evidence).

Answer to Interrogatory Number 25.

I have in my possession or under my control the original amended excess profits tax return of the Updike Grain Company, Omaha, Nebraska for the fiscal period ending June 30, 1917, subscribed September 27th, 1917 and filed with the Collector of Internal Revenue at Omaha, Nebraska, on or about September 28th, 1917. This is an amended excess profits tax return filed by Updike Grain Company under the Act of March 3, 1917.

Answer to Interrogatory Number 26.

Said return was received in the office of the Commissioner of Internal Revenue October 6, 1917. A photostat copy of the same is hereto attached. (Photostat copy referred to is same as Exhibit 9 already received in evidence).

Answer to Interrogatory Number 27.

I have in my possession or under my control the original income tax return of Updike Grain Company of Omaha, Nebraska for the period July 1, 1917 to August 28, 1917, subscribed January 25, 1918 and filed with the Collector
207 of Internal Revenue at Omaha, Nebraska on or about January 29th, 1918. This is an income tax return filed by Updike Grain Company under the Revenue Act of September 8, 1916 as is shown upon the face of said return.

Answer to Interrogatory Number 28.

There is no record of the date said return was received in the office of the Commissioner of Internal Revenue. A

photostat copy of said return with affidavit of Gorton Roth attached thereto is hereto attached. (Photostat copy of said return with affidavit of Gorton Roth attached thereto has already been received in evidence as Exhibit 14).

Answer to Interrogatory Number 29.

I have in my possession or under my control the original letter of John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, to Commissioner of Internal Revenue, dated October 26th, 1918, and the report of Revenue Agent L. C. Smith of date October 25th, 1918 with exhibits and Forms 1031 and 1103 attached thereto transmitted in said letter from the said John J. Gillin. There is no record of Form 7894, which was merely a form called "Synopsis of returns for investigation". This form was formerly used in the Income Tax Unit when it was desired to have a field investigation made of a taxpayer. Instead of sending the original return to the Internal Revenue Agent, certain data upon the return would be placed upon Form 7894, and then sent to the Internal Revenue Agent. These forms are no longer used. The particular forms referred to in this Revenue Agent's report can not now be found.

Answer to Interrogatory Number 30.

A photostat copy of Revenue Agent Gillin's letter and a copy of Revenue Agent Smith's report with exhibits (except Forms 7894) are hereto attached. Said letter and copy of report were received in this office October 31, 1918.

208 (Photostat copy of Revenue Agent Gillin's letter and copy of Revenue Agent Smith's report with exhibits (except Forms 7894) have alreadys been received in evidence as Exhibit 2).

Answer to Interrogatory Number 31.

I have in my possession or under my control a letter from John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, to Commissioner of Internal Revenue dated June 30, 1919 respecting taxes against Updike Grain Company and transmitting a supplemental report of Revenue Agent L. C. Smith respecting said taxes dated June 30th 1919, and said transmitted report.

Answer to Interrogatory Number 32.

Said letter and a copy of supplemental report were received in this office on or about July 11, 1919. Photostat copies of the same are hereto attached. (Photostat copies

letter and supplemental report are included in Exhibit 2 already received in evidence).

Answer to Interrogatory Number 33.

After diligent search of this office I do not find any other correspondence between John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, and Commissioner of Internal Revenue, respecting the taxes claimed to be due from the Updike Grain Company under the Act of October 3, 1917 or respecting the review and audit made of the books and records of said Updike Grain Company in October, 1918 and June, 1919, respecting said taxes, except copy of letter mentioned in Interrogatory Number 69 and answer thereto.

Answer to Interrogatory Number 35.

I have in my possession or under my control the following letters and telegrams or copies thereof respecting the taxes claimed to be due from the Updike Grain Company under the Revenue Act of October 3, 1917 or respecting the re-
209 view and audit made of the books and records of said Updike Grain Company in October, 1918 and June, 1919, namely:

Letter dated April 27, 1923 from A. B. Allen, Collector of Internal Revenue, to the Commissioner of Internal Revenue.

Copy of letter dated May 2, 1923 from H. F. Mires, Acting Deputy Commissioner of Internal Revenue, to the Collector of Internal Revenue.

Copy of letter dated May 8, 1923 from C. R. Nash, Deputy Commissioner of Internal Revenue, to the Collector of Internal Revenue, transmitting copy of memorandum of date May 4, 1923 from Nelson T. Hartson, Solicitor of Internal Revenue.

Letter dated June 5, 1923 from A. B. Allen, Collector of Internal Revenue, to the Commissioner of Internal Revenue.

Letter dated December 4, 1923 from A. B. Allen, Collector of Internal Revenue, to Honorable D. H. Blair, Commissioner of Internal Revenue.

Copy of letter dated December 10, 1923 from H. F. Mires, Deputy Commissioner of Internal Revenue, to the Collector of Internal Revenue.

Letter dated February 19, 1924 from A. B. Allen, Collector of Internal Revenue, to Honorable D. H. Blair, Commissioner of Internal Revenue.

Letter dated February 21, 1924 from A. B. Allen, Collect of Internal Revenue, to Honorable D. H. Blair, Commissio of Internal Revenue.

Letter dated February 23, 1924 from A. B. Allen, Collect of Internal Revenue, to Honorable D. H. Blair, Commissio er of Internal Revenue.

Copy of letter dated December 30, 1924 from J. G. Brig Deputy Commissioner of Internal Revenue, to the Collect of Internal Revenue.

Copy of letter dated December 31, 1926 to Collector
210 Internal Revenue from C. R. Nash, Assistant to t Commissioner.

Copy of telegram dated February 4, 1927 to Collector of I ternal Revenue, from D. H. Blair, Commissioner of Intern Revenue.

Telegram dated February 4, 1927 to D. H. Blair, Commi sioner of Internal Revenue, from Allen, Collector of Intern Revenue.

Letter dated February 5, 1927 from A. B. Allen, Collect of Internal Revenue, to D. H. Blair, Commissioner of I ternal Revenue.

Answer to Interrogatory Number 36.

Copies of correspondence mentioned in answer to Interro atory Number 35 are hereto attached.

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO

April 27, 1923.

Internal Revenue Bureau
APR 30 1923
OFFICE OF CERTIFY COMMISSIONER
ACCOUNT AND COLLECTIONS UNIT

The Commissioner of Internal Revenue,

Washington, D. C.

Dear Sir:

Reference is to the following cases involving additional tax assessments against Nebraska corporations for the year 1917, the particular cases being:-

Name.	Amt.	Com.List.	Page.	Line.
Updike Grain Co.	$373,911.54	Jan.1920.	14	1
Missouri Valley Elevator Co.	34,561.92	Nov.1919.	7	4
Arlington Lumber & Grain Co.	1,526.47	May 1921.	55	2
Hynes Elevator Co.	23,915.39	Feb.1920.	12	1

The aggregate amount involved, together with accrued interest, is upwards of $500,000.00.

The principal individual stockholder in all these cases I understand, is Mr. W. B. Updike, of Omaha, one of the leading grain men of the west, and the owner of a big daily newspaper, the Omaha Bee. We have had the matter of settlement up with Mr. Updike a number of times, but there is always some impediment in the way, legal or otherwise. Really, I don't know just how to proceed and I would like to have instructions.

The facts seem to be as follows:-

The corporations referred to were all dissolved and the respective assets distributed amongst the stockholders during the month of August (or thereabout), 1917, prior to the passage of the Act of October 3, 1917, which Act was retroactive to January 1, 1917.

To the Commissioner #2.

It is claimed by the taxpayers that they made returns for the part of the year 1917 up to the time of dissolution, and paid the tax as determined up to that time. Later, when the audit was made by the department and the additional assessments were set up, the taxpayers filed claims for abatement which, in the process of time, were rejected by the Commissioner. (See Commissioner letter to Updike Grain Company, #612 Grain Exchange Building, Omaha, Nebraska, dated July 13, 1921, symbol, IT:SA:CR:E-RS).

Now, the situation is this:- The representative corporations were all dissolved about August 1, 1917; the assets were distributed amongst numerous stockholders; several of the stockholders (I think eight or ten) have since died; returns were filed up to the time of dissolution and the tax on said returns was paid: there apparently is no property of the corporations which could be seized by distraint.

It is evident from our knowledge of the circumstances that collection could only be made by suit. Mr. Updike seems to think that there are legal principles involved and court decision that would constitute a defense. On that point I can express no opinion. I would like to have instructions as to how to proceed. Would I be justified in suggesting the possibility of the department entertaining a reasonable compromise and if so, what do you think would be a "reasonable compromise." I do not know that the taxpayers would entertain the idea of a compromise, but we might try. Please advise me.

Very truly yours,

A. B. Allen

ABA-MH

Collector.

May 5, 1938.

[redacted]

[redacted]
Omaha, Nebraska.

Reference is made to your letter of April 27th, in-
closed herewith, in regard to a number of cases involving
claims made by shareholders against Nebraska corporations
for the year 1937.

In view of the fact that the corporations referred to
have not dissolved and that corresponding assets distributed
among the shareholders, that some of the shareholders have
moved away, and that there is apparently no property of the
corporations which could be reached by distraint, and that
collection can apparently be made only by suit, this office
has requested the collector of internal revenue to prepare
an opinion relative to this matter, promptly upon receipt
of this reply you will be communicated with again.

H. P. Nurse

[redacted] Acting Deputy Commissioner.

May 6, 1922.

ASC:CAP:O

Collector of Internal Revenue,

Omaha, Nebraska.

Further reference is made to your letter of April 27th, initialed ABA-MH, in regard to a number of cases involving additional tax assessments against Nebraska corporations for the year 1917.

As you were advised under date of May 2nd, the matter was referred to the Solicitor of Internal Revenue for an opinion. There is now enclosed herewith a copy of his reply which is self-explanatory.

[Signed] C. R. Nash.

Deputy Commissioner.

Enclosure.

SOL:C

MAY 7 1923
SOLICITOR AND COLLECTION'S UNIT

May 4, 1923.

DEPUTY COMMISSIONER NASH:

Reference is made to your memorandum (A&C:O&P:O) under date of May 2, 1922, transmitting a letter from the Collector for the District of Nebraska under date of April 27, 1923, regarding additional assessments for the year 1917 against the following Nebraska corporations:

Updike Grain Co.	$373,911.54	Jan. 1920	Com. List	Page	14,	Line	1
Missouri Valley Elevator Co.	34,561.92	Nov. 1919	"	"	"	7	"	4
Arlington Lumber & Grain Co.	1,526.47	May 1921	"	"	"	55	"	2
Hynes Elevator Co.	23,915.39	Feb. 1920	"	"	"	12	"	1

It appears that all of these corporations were dissolved and the assets distributed among stockholders during the summer of 1917 and prior to the passage of the Revenue Act of 1917. The letter states that the corporations made returns for a fractional part of the year 1917 up to the time of distribution and paid the tax under the rates in force at that time. A later audit of the returns resulted in additional assessments due to the provisions of the Revenue Act of 1917 which were retroactive in application. Assuming that returns were filed in August 1917, suit for the recovery of additional taxes for the year 1917 was barred in August 1922 under the provisions of Section 250 (d) of the Revenue Act of 1921. As the corporations have been dissolved, warrant of distraint against the corporations cannot be enforced as against stockholders of the former corporations and unless the stockholders voluntarily submit an offer in compromise of the amount of the tax there is no means of enforcing liability. If the corporations have any property distraint will lie providing the assessment was made within the period of limitation as prescribed by Section 250 (d) of the Revenue Act of 1921.

The letter of the collector forwarded with your memorandum is returned herewith.

Nelson T. Hartson
Solicitor of Internal Revenue.

hmm.
enc. 11285.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO A&C:OAP:O

OMAHA, NEBR. June 5,1923.

Commissioner of Internal Revenue,

Washington, D.C.

Reference is made to your letter of May 8th, 1923, initialed A&C:OAP:O, in reply to my letter of April 27th, regarding a number of cases involving additional tax assessments against Nebraska corporations for the year 1917, and enclosing copy of an opinion of the Solicitor of Internal Revenue relative to the collection of these taxes, and I have the honor to advise that Mr. Nels Updike, one of the stockholders of these several corporations, has submitted an offer in compromise of $10,000.00 in lieu of payment of the assessments involved.

Due to the fact that suit for the recovery of these additional taxes is barred by the Statute of Limitations, I am recommending that this offer be accepted.

This offer is being taken up in the regular way, and will appear on my June Supplemental 1923 List, Account #540039.

A. B. Allen
Collector.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

OMAHA, NEBR.

December 4, 1923.

RECEIVED BUREAU OF INTERNAL REVENUE DEC 6 1923 OFFICE OF DEPUTY COMMISSIONER OF COLLECTIONS AND ACCOUNTS

ABC:GAF:O

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Please be referred to my letter to you of June 5, 1923, symbol as above, and other correspondence connected therewith, all relating to an offer in compromise in the amount of $10,000, submitted by Mr. H. B. Updike of Omaha, in lieu of payment of certain assessments set up against a number of grain companies in which Mr. Updike was interested and against which assessments the statute of limitation seems to have run.

This matter has been pending since last June and the taxpayer is anxious to know whether or not the department has accepted his offer. My letter of June 5th, recommends acceptance for the reason that the department apparently has no sufficient claim against the interests involved, and it would, therefore, seem to be good judgment to accept the offer as submitted.

The correspondence referred to will give you all the facts in connection with the case.

If the offer is accepted we would file claim for abatement covering the remainder of the assessment and thus relieve our books of a charge which looks big in figures but which does not apparently represent a genuine asset.

Awaiting your reply, I am,

Very truly yours,

A. B. Allen
Collector.

ABA-MH

237

a 7

December 20, 1926.

ASC:GLP:O

Collector of Internal Revenue,

Omaha, Nebraska.

Reference is made to your letter of December 4th, initialed ABA-MH, requesting information as to the status of the offer in compromise filed by Mr. H. B. Updike of Omaha, Nebraska.

In reply, you are informed that a copy of your letter has been referred to Deputy Commissioner Bright of the Income Tax Unit, who will no doubt communicate with you direct in connection with the matter.

(Signed) H. F. Mires

Deputy Commissioner.

SfWi
Cl

298

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO

OMAHA, NEBR.

February 19, 1924.

RECEIVED IN
FEB 21 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE

SOL:C:CAB-
197104.

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

I am in receipt of copy of your letter of February 12, 1924, addressed to Mr. E. B. Updike, copy hereto attached, symbol as above, having reference to certain additional assessments against a number of corporations in which Mr. Updike was interested.

I also attach hereto copy of my letter addressed to you under date of June 5, 1923, symbol A&C:OAP:O, and also copy of an opinion by Solicitor of Internal Revenue, Nelson T. Hartson, dated May 4, 1923, and addressed to Deputy Commissioner Nash, all in reference to the case at issue, and constituting a part of our file and of your file in said case.

It will be noted that in Mr. Hartson's opinion he says in part:-

> "Assuming that returns were filed in August, 1917, suit for the recovery of additional taxes for the year 1917 was barred in August, 1922, under the provisions of Sec. 250 (d), of the Revenue Act of 1921. As the corporations have been dissolved warrant of distraint against the corporations cannot be enforced as against any stockholders of the former corporations, and unless the stockholders voluntarily submit an offer in compromise of the amount of the tax, there is no means of enforcing liability. If the corporations

have any property distraint will lie, providing the assessment was made within the period of limitation as described by Sec. 250 (d), of the Revenue Act of 1921."

In the copy of your letter of February 14, 1924, addressed to Mr. Updike, and in which you reject the offer in compromise in the sum of $10,000, previously made by Mr. Updike, you say:- "The case will proceed as if no offer had been made."

Now, if the statute of limitation has run as Solicitor Hartson seems to think it has, and if the corporation's property has been distributed (as it has), and there is nothing left to distrain upon, I am at a loss to know what law we can invoke as a basis for further procedure.

In securing an offer in compromise as per my letter of June 5, 1923, we supposed we were complying with the information conveyed by Mr. Hartson's opinion above referred to.

Kindly instruct me as to further procedure.

Very truly yours,

A. W. Alexander
Collector.

ARA-MH
Encs.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

February 21, 1924

SOL:C:CAR
197104

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Supplementing my letter to you of February 19, 1924, in Re the above case, symbol SOL:C:-CAR, 197104:

I neglected to state that the taxpayers in the cases at issue failed and refused to file and sign returns for the year 1917 under the provisions of the Act of Oct. 3, 1917, and therefore, under the terms of the Act of Oct. 3, 1917 and the provisions of Article 61, Regulations No. 33, it is possible that Solicitor Bertron was in error, in his opinion of May 4, 1923 (copy of which opinion was attached to my letter of February 19) in "assuming" that the statute of limitations had run.

The taxpayers did file 1917 returns under the Act of September 8, 1916, covering period up to June 30, 1917 (Forms 1031) but they did not file returns under the Act of Oct. 3, 1917 and hence were apparently delinquent and not entitled to the benefits of the statute of limitations.

Very truly yours,

A. B. Anderson
Collector

197104
RECEIVED
FEB 25 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE

Updike Grain Company et al
CIVIL DIV.

245

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

February 23, 1924

197104

RECEIVED IN
FEB 28 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE
CIVIL DIV

A:OL:C:CAP
197104

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

On April 27, 1923, I wrote you in regard to a group of cases, covered by the above symbol, copy hereto attached, in which letter the individual cases were set out with the exception that I did not specifically mention the

Updike Elevator Co., April Com. 1919 List, Page 13, Line 9, Amount $7468.14.

However, this amount was included in the approximate total as stated in my letter of April 27, 1923. The reason why the item was omitted from previous letter was because a claim for abatement was filed in that particular case on Feb. 19, 1920 and we had no report of the rejection of said claim until Feb. 7, 1924. The status of the Updike Elevator case is the same as that of the other four cases mentioned in my letter of April 27, 1923.

The intent of my letter of April 27 was compliance ~~[illegible]~~ with Article 1008, Regulations 62, which reads in part as follows:

"However, no suit for the recovery of unpaid taxes or of any fine, penalty, or forfeiture shall be commenced until the collector shall have submitted to the Commissioner a full report of all material facts and circumstances in the case and shall have received from him express authority to proceed."

In my letter of April 27, 1923, I set up the facts as they appeared at that time and I said: "It is evident from our knowledge of the circumstances

247

912

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA
IN REPLYING REFER TO

DHS 2

that collection could only be made by suit. x x x I would like to have instructions as to how to proceed."

Instead of receiving instructions to institute suit as I had expected, I received an opinion from Solicitor Hartson (copy attached to my letter to you of Feb. 19, 1924) in which he suggested the possibility of a compromise, which suggestion I accepted as instruction and acted on. It appears that such action was ill-advised and a waste of time.

This letter is therefore a repetition of my request of April 27, 1923 to be advised as to whether or not I am authorized to institute suit for recovery, in compliance with the provisions of Article 1008, Regulations No. 62.

Your prompt reply will be appreciated as I deem speedy action necessary.

Very truly yours,

A. B. Allen
Collector

249

212

COPY

December 30, 1924.

IT:R:P:EWC

Collector of Internal Revenue,

Omaha, Nebraska.

Reference is made to your letter dated October 1, 1924 relative to the offers in compromise in the amounts of $200.00 and $10,000.00 tendered by Nelso B. Updike, 618 Omaha Grain Exchange, Omaha, Nebraska, in lieu of additional tax assessed against the following companies:

Updike Grain Company,	
Missouri Valley Elevator Co.,	$10,000.00
Arlington Lumber & Grain Co.,	
Hynes Elevator Company,	
and	
E. Stockham Grain Company,	
Carbon Coal & Supply Company,	$200.00

You request that Special Allowance be issued as your authority to refund the amounts of the above offers to the taxpayer, therefore, same are enclosed and you should secure Form 627 and forward to this office together with the special allowances covering the amounts to be refunded.

J. G. BRIGHT,

Deputy Commissioner.

By

Head of Division.

Enclosure:
Spec. Al.

2/4 29

(COPY)

Washington, D. C.
December 31, 1926.

IT:L:RR:280
HTL

Collector of Internal Revenue,
Omaha, Nebraska.

In re: Updike Grain Company
Omaha, Nebr.

Reference is made to the following tax due from the above-named company:

$373,911.54, assessed on the Commissioner's January 1920 list, Page 14, Line 1.

This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53. A copy of this letter should be attached to Form 53 prior to transmitting such form to this office.

(Signed) C. R. Nash,
Assistant to the Commissioner.

R15 253

TREASURY DEPARTMENT TELEGRAM.

WHERE WRITTEN:
SC:DIRE
IRT:R:V:
220256

Washington,
February 4, 1927.

Collector of Internal Revenue,

Omaha, Nebraska.

Reference assessment three hundred seventythree thousand nine hundred eleven dollars fiftyfour cents additional income excess profits taxes against Updike Grain Company fiscal year ended June thirty nineteen seventeen appearing on January nineteen twenty list page fourteen line one STOP This assessment must not be abated on Form fiftythree as suit for collection thereof is about to be instituted against former stockholders.

MAYO
COMMISSIONER.

OFFICIAL BUSINESS.
GOVERNMENT RATES.
CHARGE TREASURY DEPARTMENT, APPROPRIATION FOR
The appropriation from which payable must be stated above line.
DEPARTMENTAL STOCK FORM 1932

216

Treasury Department

Telegraph Office

220256

RECEIVED IN
FEB 5 - 1927
SPECIAL DISBURSING AGENT
BUREAU OF INTERNAL REVENUE

Gimlet

Collect gr. 1 ex.

Omaha Nebr 4PM Feb 4 1927.

J H Blair,

Omaha Nebr.

Referring your wire today in re assessment against Updike Grain Company appearing on January eighteen twenty list page fourteen line one stating that assessment must not be stated as suit for collection thereof is about to be instituted stop Be advised form five three was forwarded to supervisor James R Post for transmittal to your office January seventeen nineteen twenty seventh.

Allen, Collector.

GP

217

257

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

February 5, 1927.

FEB - 7 1927

Hon. D. H. Blair,
Commissioner of Internal Revenue,
Washington, D. C.

In re: Updike Grain Company.
Omaha, Nebraska.

My dear Mr. Blair:

Under date of February 4, 1927 I received from you the following telegram:

"Reference assessment three hundred seventy three thousand nine hundred eleven dollars fifty four cents additional income excess profits taxes against Updike Grain Company fiscal year ended June thirty nineteen seventeen appearing on January nineteen twenty list page fourteen line one stop This assessment must not be abated on form fifty three as suit for collection thereof is about to be instituted against former stockholders.

(SIGNED) Blair, Commissioner."

To this I replied by telegram as follows:

"Reference your wire today in re assessment against Updike Grain Company appearing on January Nineteen Twenty List Page Fourteen Line One stating that assessment must not be abated as suit for collection thereof is about to be instituted stop Be advised Form Five Three was forwarded to Supervisor James R. Peat for transmittal to your office January Seventh Nineteen Twenty-Seven.

(SIGNED) Allen, Collector."

This letter is for the purpose of confirming the above telegraphic correspondence.

In reference to the making out of Form 53, which was forwarded to Supervisor James R. Peat for transmittal to your office on January 7, 1927, I wish to add: I made no recommendation as to action to be taken on Form 53, in regard to the abatement of our claim against the Updike Grain Company of Omaha, Nebraska, but merely attached to such form copy of a letter of instruction received from your office which letter of instruction reads as follows:

918 259

D. H. Blair, #2.

"IT:E:RA:280
HTL.

WASHINGTON, D. C.,
December 31, 1926.

Collector of Internal Revenue,
Omaha, Nebraska.

In re: Updike Grain Company,
Omaha, Nebraska.

Reference is made to the following tax due from the above-named company:

$373,911.54, assessed on the Commissioner's January 1920 List, Page 14, Line 1.

This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53. A copy of this letter should be attached to Form 53 prior to transmitting such form to this office.

(Signed) C. R. Nash,
Assistant to the Commissioner."

I thought best to acquaint you with all the facts pertaining to this phase of the case.

Very truly yours,

A B Allen
Collector.

ABA:MCS.

261

919

230 Answer to Interrogatory Number 37.

I have in my possession or under my control a letter of date February 19, 1924, from James J. Drakeford, Internal Revenue Agent in Charge, Omaha, Nebraska addressed to the Commissioner of Internal Revenue; a copy of a letter of date February 15 1924, from C. M. Justice, Assistant Deputy Commissioner of Internal Revenue, to the Internal Revenue Agent in Charge at Omaha, Nebraska.

Answer to Interrogatory Number 38.

Copies of correspondence mentioned in answer to Interrogatory Number 37 are hereto attached.

197104

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

Feb. 19, 1924

RECEIVED IN
FEB 21 1924
SOLICITOR'S OFFICE
BUREAU OF INTERNAL REVENUE

OFFICE OF
INTERNAL REVENUE AGENT IN CHARGE
OMAHA DIVISION

SOL:C:CAB
197104

Updike Grain Co. et al
Missouri Valley Elevator Company,
Arlington Lumber & Grain Company,
Hynes Elevator Company,
Omaha, Nebraska.

Commissionor of Internal Revenue,
Washington, D.C.

Attention:
Asst. Deputy Commissioner IT:P

Receipt is acknowledged of your letter of February 15th relative to the above named corporations.

These cases will be given immediate attention, and the list of stockholders submitted just as soon as possible if a record can be secured of these stockholders. See report dated December 21, 1921 made by Revenue Agent C.L. Carlson on the Updike Grain Co. et al.

Jas. J. Drakeford
Revenue Agent in Charge

JJD:SCR

61

FEB 1 5 1924

SOL:C:CAB
197104

Internal Revenue Agent in Charge,

Omaha, Nebraska.

In re: Updike Grain Company,
Missouri Valley Elevator Company,
Arlington Lumber & Grain Company,
Hynes Elevator Company,
Omaha, Nebraska.

Reference is made to unpaid additional corporation income and excess profits tax for fiscal 11-month period ended June 30, 1917, assessed against the Updike Grain Company in the amount of $373,911.54; for fiscal 11-month period ended May 31, 1917, assessed against the Missouri Valley Elevator Company in the amount of $34,541.94; for fiscal 10-month period ended May 31, 1917, assessed against the Arlington Lumber & Grain Company in the amount of $1,546.47; and for fiscal 11-month period ended June 30, 1917, assessed against the Hynes Elevator Company in the amount of $23,915.39.

An offer of $1[illegible],000 submitted in compromise of the above named tax liability has been rejected.

It is requested that an agent be assigned to secure the following additional information.

(1) Date and manner of dissolution of the above named companies, whether by voluntary action of stockholders or by order or decree of court. If by order or decree of court a copy of same should be forwarded.

(2) The names and present addresses of stockholders in these companies, giving number of shares held by each at time of dissolution and corporate assets received by each upon final liquidation of the companies.

CAB mlo 2/14/24 Gm 2/14/24

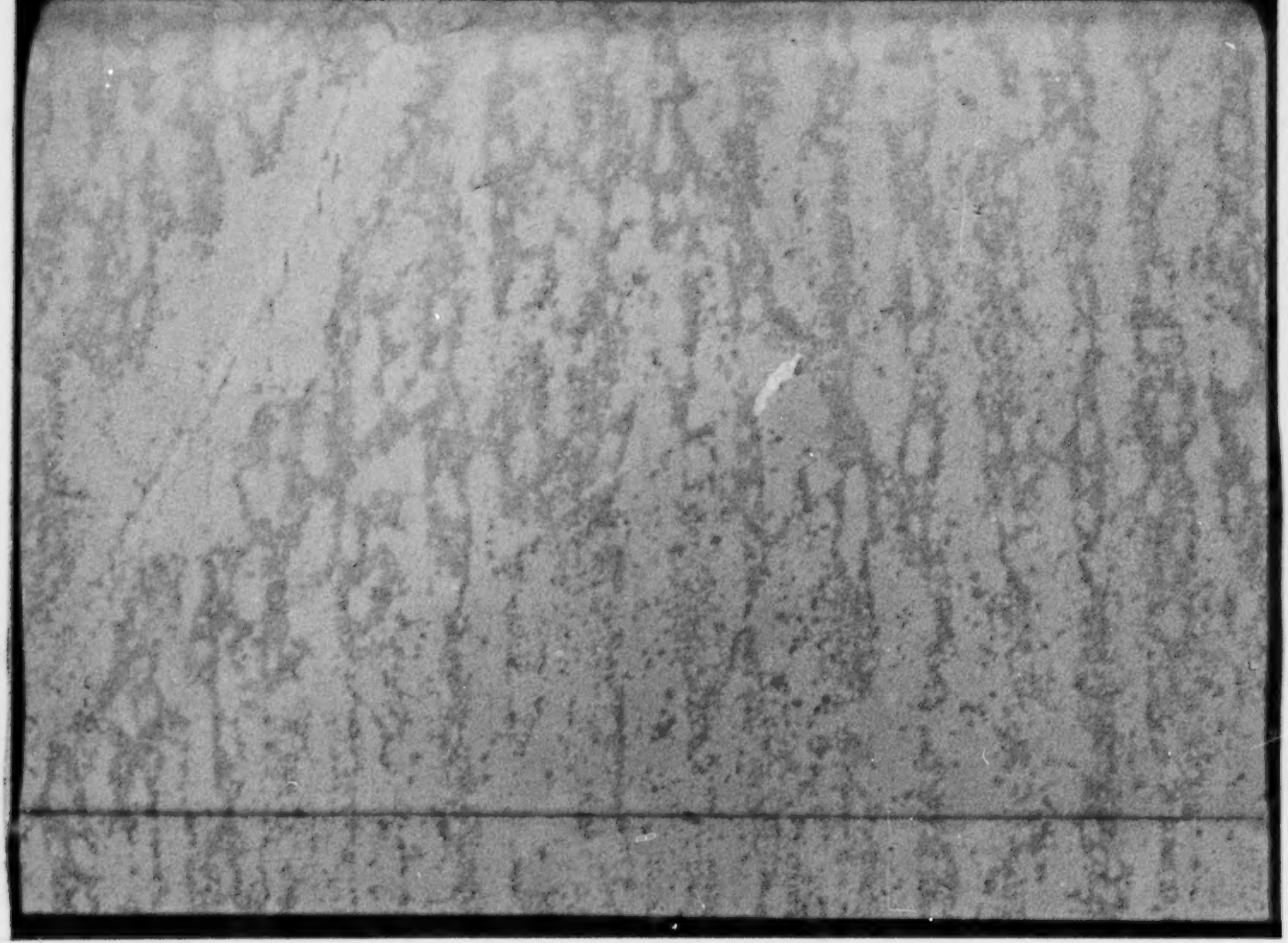
267

The list of stockholders attached to your report on the Updike Grain Company dated October 26, 1918, is incomplete in the files of this office.

Please acknowledge receipt of this letter and forward as soon as possible a report as to the results of your investigation, referring in your reply to the serial number and symbols appearing in the upper left-hand corner of this letter.

(sgd) C. M. Justice

Assistant Deputy Commissioner.



234 Answer to Interrogatory Number 45.

Copy of letter from L. F. Speer, Deputy Commissioner of Internal Revenue, to Joseph and Alvin T. Sapinsky of New York, dated on or about October 27, 1917, is herein before attached as Exhibit 12. The opinion expressed in this letter was afterwards reversed, as appears in Regulations Number 33, Article 61, in accordance with the decision of the Court in Brady vs. Anderson, 240 Federal 665, cited in said article.

235 Answer to Interrogatory Number 54.

After diligent search no record of telegram of Brogan, Ellick and Raymond to Nelson T. Hartson, respecting the above taxes, dated May 8, 1923, can be found.

Answer to Interrogatory Number 55.

This office has offer of compromise dated on or about May 25, 1923 of the above taxes, with the letter of A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, transmitting said offer of compromise and the recommendations respecting the same.

Answer to Interrogatory Number 56.

Copy of said offer in compromise and copy of letter of A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, transmitted therewith, are attached hereto:

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Form 656—Revised November, 1922

OFFER IN COMPROMISE

(This side to be filled in by taxpayer.)

JUNE 40039

Omaha, Nebr.
(City and State)

COLLECTOR OF INTERNAL REVENUE,

Omaha, Nebr.
(Address)

The following offer in compromise is submitted to you for transmittal to the Commissioner of Internal Revenue,

(Signature of tax payer.)

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

Charges of violation of law have been made against the undersigned as follows: That this tax has been assessed against the following described corporations Middle Town Co. Missouri Valley Electric Co. Arlington Ice and Power Co. and Hopper Electric Co. of which corporations the undersigned was a stockholder and tax for the year 1917 aggregating $433918.32

Date and place of alleged violation .....

The alleged violation is due to the following cause or causes: .....

Having been advised of the privilege of submitting an offer in compromise of the liability incurred, the sum of $10000.00 is hereby tendered voluntarily with request that it be accepted in lieu of payment of said assessment as a compromise offer and that release be granted the undersigned from all liability resulting from the violation specified.

~~accepting~~ .....

It is understood that this offer does not afford relief from the liability incurred unless and until it is actually accepted, and that the offer can not be considered as having been accepted until the date on which formal notice of acceptance thereof is signed by the Commissioner.

(Insert statement concerning payment of costs, if any)

(Signature)

Sworn and subscribed to before me this

25 day of May 1923

L Hanson
Deputy Collector or Notary Public.

RECEIVED and FILED
MAY 25 1923
OMAHA, NEBR.

Lee 10,000.00

* Strike out name not applicable.

a1

278

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Commissioner's Office shows the following facts as to the assessment and payment of the tax:

NAME AND ADDRESS.	CHARACTER OF ASSESSMENT OR ARTICLE TAXED.	PERIOD COVERED BY ASSESSMENT.	LIST.	YEAR.	MONTH.	PAGE.	LINE.	AMOUNT.
Updike Grain Co.	R & P 6/30/1911	11 Mos. 6/30/17	238	1918	Jan	14	1	373911 54

E. Kenny
Assessment Clerk, Internal Revenue Bureau.

AC

Form 47

Abatement Order No. .....

District Nebraska

Income
(Nature of tax.)

26980

Claimant Updike Grain Co.

Address 625 Omaha Grain Exchange Omaha Neb

Examined and submitted for action ....., 19....

Claim examined by: AA

Claim approved by: AA
Chief of Division.

Amount claimed, $ 373,911.54

Amount allowed, $ None

Amount rejected, $ 373,911.54

COMMITTEE ON CLAIMS:

E H Baldon

J C Rogerson

68696

275

COLLECTOR'S RECOMMENDATION

Commissioner of Internal Revenue,
Washington, D.C.

Yodike Train Co., Omaha, Nebr.
Missouri Valley Elevator Co., " "
Arlington Lbr. & Train Co., " "
Imes Elevator Co., " "

Herewith is an offer made by .....

of .....
(Insert complete address)

on 5/25/27 (Date filed), in compromise of ..... liability* incurred because

of Offer in compromise in lieu of additional tax assessed

in violation of by Commissioner against the above corporations for the

year 1917.

The period of liability is 1917 Return was filed on Form No. .....

This case is (not) in suit. for ..... (Period) on ..... (Date)

The amounts of tax, penalties, etc., heretofore assessed and paid follow:

	Amount assessed	Amount paid	Assessment made on Line	Page	Month & Yr.
Tax	$	$			
Additional tax	SEE LETTER ATTACHED				
Per cent penalty					
Per cent penalty					
Interest					
TOTAL					

COMPROMISE OFFER	$ 10,000.00
Costs incurred, if any	none
AMOUNT PAID	10,000.00

This compromise item appears on page ..... line ..... (or Serial No. 540079) of Supp list

for June 1929 and the amount actually paid ($ 10,000.00)

is included in certificate of deposits ..... bearing date of 6/3/27

I recommend that the offer be ..... accepted ..... for the following reasons:

Corporation all dissolved prior to the passage of the Rev Act 1928 also further fact that the statute of limitations has run.

Date signed ..... 1929 ..... Collector ..... District.

THIS FORM FOR OFFICIAL USE ONLY.
OFFER REJECTED
REJECTION STIPULATED
REFUND ALLOWED
DATE 12-24-29
75755

* The Commissioner of Internal Revenue can not compromise liability under the Food Control Act, War Prohibition Act, Reed Amendment, criminal liability under Title II of the National Prohibition Act, Act of February 9, 1909, as amended, or the Criminal Code.

Where a case is covered by the report of a revenue agent, prohibition agent, or has been referred to a United States Attorney, the collector will procure from either or both, as the case may be, statements in regard to the advisability of accepting or rejecting the offer, and will forward the original of such statements, together with the offer, to the Commissioner of Internal Revenue, with this form.

Where liability is incurred because of failure to collect SALES TAXES, the amount of tax which should have been collected must be indicated.

277

A&C:OAP:O

Commissioner of Internal Revenue

Washington, D. C.

Reference is made to your letter of [illegible], initialed A&C:OAP:O, in reply to my letter of [illegible], recording a number of cases involving [illegible] assessments against Nebraska corporations for the year 1917, and enclosing copy of an opinion of the Solicitor of Internal Revenue relative to the collection of these taxes, and I have the honor to advise that Mr. Hale Updike, one of the stockholders of these several corporations, has submitted an offer in compromise of $10,000.00 in lieu of payment of the assessments involved.

Due to the fact that suit for the recovery of these additional taxes is barred by the Statute of Limitations I am recommending that his offer be accepted.

This offer is being taken up in the regular way and will appear on my June Supplemental 1923 List, Account #540039.

(Signed) A. Nissen

Collector.

a3

617

40 Answer to Interrogatory Number 58.

After diligent search no record of telegram of Nelson . Updike to D. H. Blair, Commissioner of Internal Rev-nue, dated May 20, 1924, respecting the above taxes, can be ound.

Answer to Interrogatory Number 61.

The Bureau of Internal Revenue and the Commissioner of nternal Revenue have at all times asserted and claimed that ssessments, made and entered in the manner in which the ssessment was made and entered against the Updike Grain ompany, in the amount of $373,911.54, were valid and en-rcible assessments.

Answer to Interrogatory Number 62.

The Bureau of Internal Revenue and the Commissioner of nternal Revenue have at all times asserted and claimed that ssessments made and entered in the manner in which the as-ssment was made and entered against the Updike Grain ompany, in the amount of $373,911.54, were valid and en-rcible assessments, as of the dates same were entered or ted upon the assessment roll or list of the Commissioner of nternal Revenue.

Answer to Interrogatory Number 63.

The Commissioner and the Bureau of Internal Revenue ve at all times up to on or about the time of the bringing the above entitled action claimed that the assessment ade against the Updike Grain Company in January, 1920, the amount of $373,911.54, was a valid assessment.

Answer to Interrogatory Number 69.

Copy of letter of date November 20, 1919, addressed to In-rnal Revenue Agent in Charge, Omaha, Nebraska, from ting Assistant to the Commissioner, is hereto at-ched.

[redacted]

In re: Updike Grain Company,
Omaha, Nebraska.

NOV 2 - 1918

IT:IA:EAA:C
EJB-29500995

Internal Revenue Agent in Charge,

Omaha, Nebraska.

Reference is made to your report dated October 26, 1918 and supplemental report dated June 30, 1918, covering investigation by Revenue Agent L. G. Smith, of the books and records of the above named corporation for the purpose of verifying income and excess profits tax liability for 1913 to 1917, inclusive.

An error exists in computing gross income in your amended figures for fiscal years ended July 31, 1915 and July 31, 1916. For 1915, gross income, $442,895.00, is understated by $5,000.00, and gross income for 1916, $609,459.54, is overstated by $5,000.00. Correcting these errors, additional tax due for 1915 and 1916 would be $45.81 and $3,015.53, respectively, and not $95.81 and $3,094.70 as shown.

The additional tax still due by the corporation for the eleven months ended June 30, 1917, $373,911.54, is correctly stated in your supplemental report of June 30, 1918.

Since the corporation failed to file a claim for the refund of overpayment for 1913 amounting to $250.25, this office is barred by Section 252 of the Revenue Act of 1918, in offsetting the amount against the additional taxes found to be due.

The overpayment for 1914 amounting to $113.01 will be offset against the additional tax $145.81 due for 1915, leaving a balance of $32.80 due for this year.

A summary of additional taxes for years follows:

1915	$32.80
1916	3015.53
1917	373911.54
Total	376959.87

21

283

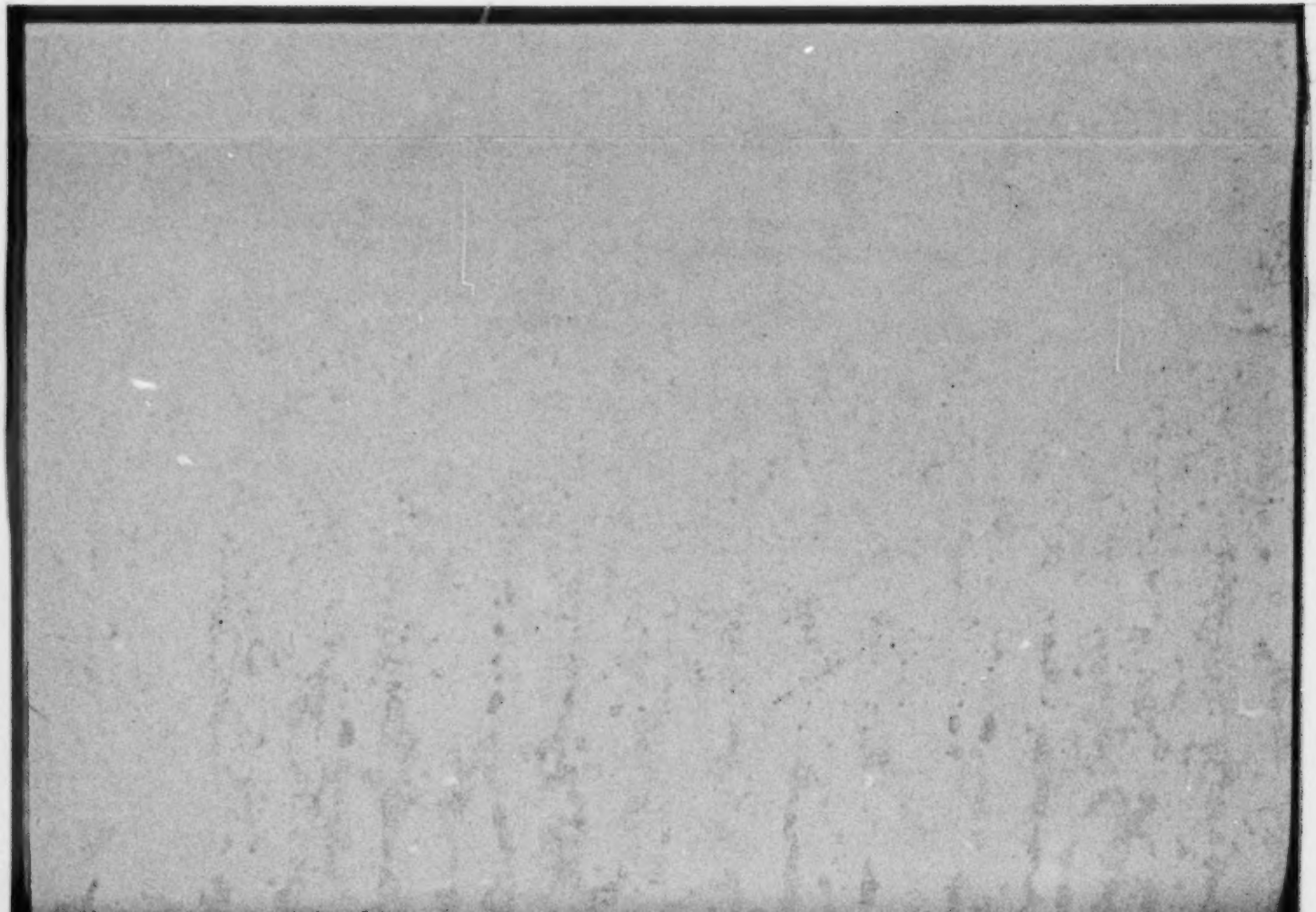
I. R. A. Omaha, Nebraska.

You are instructed to advise the corporation of the result of this audit.

A copy of this letter is being forwarded to the Collector for the District of Nebraska.

Acting Assistant to the Commissioner.

RJB/FH



243 Mr. Ellick: So that we will have all of the testimony of Mr. Blair together, I offer in evidence the following numbered additional interrogatories propounded to Mr. Blair as shown by the record in this case and the answers of Mr. Blair thereto: Interrogatories, 1, 2, 3, 4, 6 and 9, and that is all, except that part of the answer to Interrogatory 6 which says: "Said assessment list and certificate were then presented to C. B. Hurrey, assistant to J. H. Callan, acting Commissioner of Internal Revenue, who approved and signed said Certificate for J. H. Callan, acting Commissioner of Internal Revenue, placing his own initials after the name of J. H. Callan," for the reason that counsel for the government has informed us that that is an erroneous statement of the Commissioner.

No objection was made to the offer but the Court's attention was called to the Commissioner's answer to Original Interrogatory Number 18 relating to the assessment of January, 1920 and the Court was advised that in United States against [against] Haar in the 19th Federal (2d) 399, United States District Court for Georgia had held that an assessment would be invalid that was not based upon a return, The Trial Court was also advised that the government had appealed in this case.

The additional interrogatories propounded to Commissioner Blair and his answers thereto offered in evidence by the defendants and received by the Court are as follows:

Answer to Additional Interrogatory Number 1.

The person who computed and determined the amount of tax imposed by the Revenue Act of October 3, 1917, to-wit: $373,911.54, noted upon the income tax return of Updike Grain Company, subscribed by the President and
244 Treasurer of said company on July 24, 1917 and filed with the Collector of Internal Revenue, Omaha, Nebraska, on July 25, 1917, is believed to have been H. B. Barnett, who at that time was an auditor in the Income Tax Unit; his present address is unknown; he has resigned and left the service of the government.

Answer to Additional Interrogatory Number 2.

The amount of tax mentioned in the preceding answer is believed to have been computed and determined on or about September 4, 1919 and noted on said income tax return about the same date.

Answer to Additional Interrogatory Number 3.

It is believed that said H. B. Barnett noted the said amount of $373,911.54 upon said income tax return, being the amount of excess profits tax imposed upon Updike Grain Company by the Revenue Act of October 3, 1917.

Answer to Additional Interrogatory Number 4.

It is believed that the person whose initials appear on the right of the rubber stamp impression appearing upon the income tax return of Updike Grain Company subscribed by the President and Treasurer thereof of July 24, 1917 and filed with the Collector of Internal Revenue on July 25, 1917 is H. B. Barnett above mentioned.

Answer to Additional Interrogatory Number 6.

The names, official positions held and present addresses of the persons whose initials appear upon the lower part of the exhibit attached to my answers to interrogatories heretofore filed, being the assessment list showing the assessment of the excess profits tax imposed by the Revenue Act of October 3, 1917 in the amount of $373,911.54 upon Updike Grain Company for eleven months' period ended June 30,
245 1917, subscribed by J. H. Callan, Acting Commissioner of Internal Revenue, with statement of the particular duty which each of said persons performed with respect to said assessment (insofar as such facts can now be ascertained), are as follows:

T. F. Langley, Chief Proving Section, Bureau of Internal Revenue; Present address: Bureau of Internal Revenue, Washington, D. C.;

J. Graham, Assistant Chief, Proving Section, Bureau of Internal Revenue; Present address: Bureau of Internal Revenue, Washington, D. C.;

F. P. Cox, Controller in Proving Section, Bureau of Internal Revenue, deceased;

C. B. Allen, Head, Administrative Division, Bureau of Internal Revenue; Present address: Bureau of Internal Revenue, Washington, D. C.;

George W. Newton, Deputy Commissioner, Bureau of Internal Revenue; Present address: Washington, D. C.;

R. L. Ilsley, Head, Collection Division of Accounts and Collections Unit, Bureau of Internal Revenue; Present address:

Accounts & Collections Unit, Bureau of Internal Revenue, Washington, D. C.;

Miss I. B. Higley, in charge of Bookkeeping Machines, Proving Section, Bureau of Internal Revenue; Present address, Washington, D. C.;

George M. Maynard, Bookkeeper, Accounts and Collections Unit, Bureau of Internal Revenue; Present address: Prohibition Bureau, Washington, D. C.;

C. B. Hurrey, Assistant to J. H. Callan, Acting Commissioner, Bureau of Internal Revenue; Present address; Washington, D. C.

246 Said assessment list and certificate were prepared under the supervision of Miss I. B. Higley, in charge of Bookkeeping Machines, and said certificate was then initialed by her; said list and certificate were then transmitted to, approved, and said certificate initialed successively by said F. P. Cox, J. Graham, T. F. Langley, C. B. Allen, George W. Newton, George M. Maynard, R. L. Ilsley.

Answer to additional Interrogatory Number 9.

Photostat copies of Form 53 forwarded to Supervisor James R. Peat under date of January 7, 1927 for transmittal to the Commissioner of Internal Revenue and correspondence relating thereto are hereto attached.

(COPY)

Washington, D.C.,
December 31,1926.

IT:E:RR:280
NYL

Collector of Internal Revenue,
Omaha, Nebraska.

In re: Updike Grain Company,
Omaha,Nebr.

Reference is made to the following tax due from the above-named company:

$373,911.54, assessed on the Commissioner's January 1920 List, Page 14, Line 1.

This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53. A copy of this letter should be attached to Form 53 prior to transmitting such form to this office.

(Signed) C.R.Nash,
Assistant to the Commissioner.

FEB 10 1927

IT:C:OC:1:MSV

Collector of Internal Revenue,

Omaha, Nebraska.

Reference is made to Form 43 submitted by you against the Updike Grain Co., Omaha, Nebraska, in the amount of $978,911.64 for the year 1917.

In this connection you are advised that this office has been informed by the Office of the General Counsel that a suit for collection is about to be instituted against the former stockholders of the taxpayer company, and in view of this information, the uncollectible claim has been rejected.

J. H. SMITH,
Assistant to the Commissioner.

By
Head of Division

TREASURY DEPARTMENT
Bureau of Internal Revenue
(Form 47, Revised May, 1926)
JAN 18 1927.
Office of Deputy Commissioner, Internal Revenue, Collection District

REPORT OF UNCOLLECTIBLE TAXES

Income Tax
(Classification)

RECEIVED
JAN 7 1927
DIS[illegible] NEBR.
Collector to be plainly stamped here

Ry 701

Name of party assessed Updike Grain Company.
Address of party assessed Omaha, Nebraska.
Character of tax assessed add Income 6/30/17

DEPUTY'S AFFIDAVIT

I, T Hanson, Deputy Collector of Internal Revenue for Division No. ..... in the District designated above, hereby certify that the taxes or duties charged to and assessed against the above named have not been collected; that I demanded payment of said taxes and duties, of him on ....., 192 ; that I have been unable to collect said taxes and duties, or any portion thereof, for the reason that See letter attached

QUESTIONS TO BE ANSWERED BY DEPUTY COLLECTOR

1. Does the taxpayer reside at the given address?
2. Did the taxpayer leave a forwarding address at the post office?
3. Did you make inquiry of the person from whom the taxpayer rented his home or office relative to his present address?
4. Did you make a similar inquiry of the nearest neighbor, or place of business?
5. What public records were examined to determine whether or not the taxpayer is a property owner?
6. Was any information secured relative to the taxpayer's present location?

And I further certify that he had no property liable to distraint for the said taxes at the time when warrant of distraint could first lawfully be issued therefor, i. e., ten days after the first demand for the same, or since; that I made diligent effort to collect the said taxes and duties, and that the failure to collect the same did not arise out of or through any omission or neglect of duty on my part.

T Hanson
Deputy Collector.

Subscribed and sworn to before me this
7 day of January 1927
Russell C. Anderson,
Dep. Coll.

Recommended for approval.
James Peart

[illegible] OF AUDITS & COLLECTIONS
Post Office Box 544
ST. PAUL, MINNESOTA

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COLLECTOR'S CERTIFICATE

I HEREBY CERTIFY that I have carefully investigated the facts set forth in this claim, and am satisfied that, [redacted] .....

.....

they are in all respects just and true. And I further certify, from personal examination, that the taxes enumerated above are found on the page and line of assessment list indicated now on file in my office; and that the said taxes are included in that list as charged to me by the Commissioner of Internal Revenue; and I further certify that no credit has heretofore been allowed in any form on account of the taxes herein claimed as uncollectible and that none of them has been collected.

Assessment List					Assessed tax and penalties	Memoranda assessment	Date of issue			Date from which found to be uncollectible
Month	Year	Part	Page	Line			Form 17	Form 21	Form 49	
Jan.	192	Com.	14	1	373,911.54		7-16-21	9-23-21	12-22-21	1-7-27

Bond	Amount	Date	Surety	Referred to United States Attorney
	$			

Jan. 7, 192 7

A B Allen
Collector.

Assessment Clerk, Commissioner's Office.

[redacted]

CLAIM No.

Schedule Number RL 901 District .....

Allowed or Rejected Number .....

(Nature of tax)

Claimant .....

Address .....

Examined and submitted for action 192

SCHEDULE No.

Claim examined by—

Claim approved by—

Chief of Section.

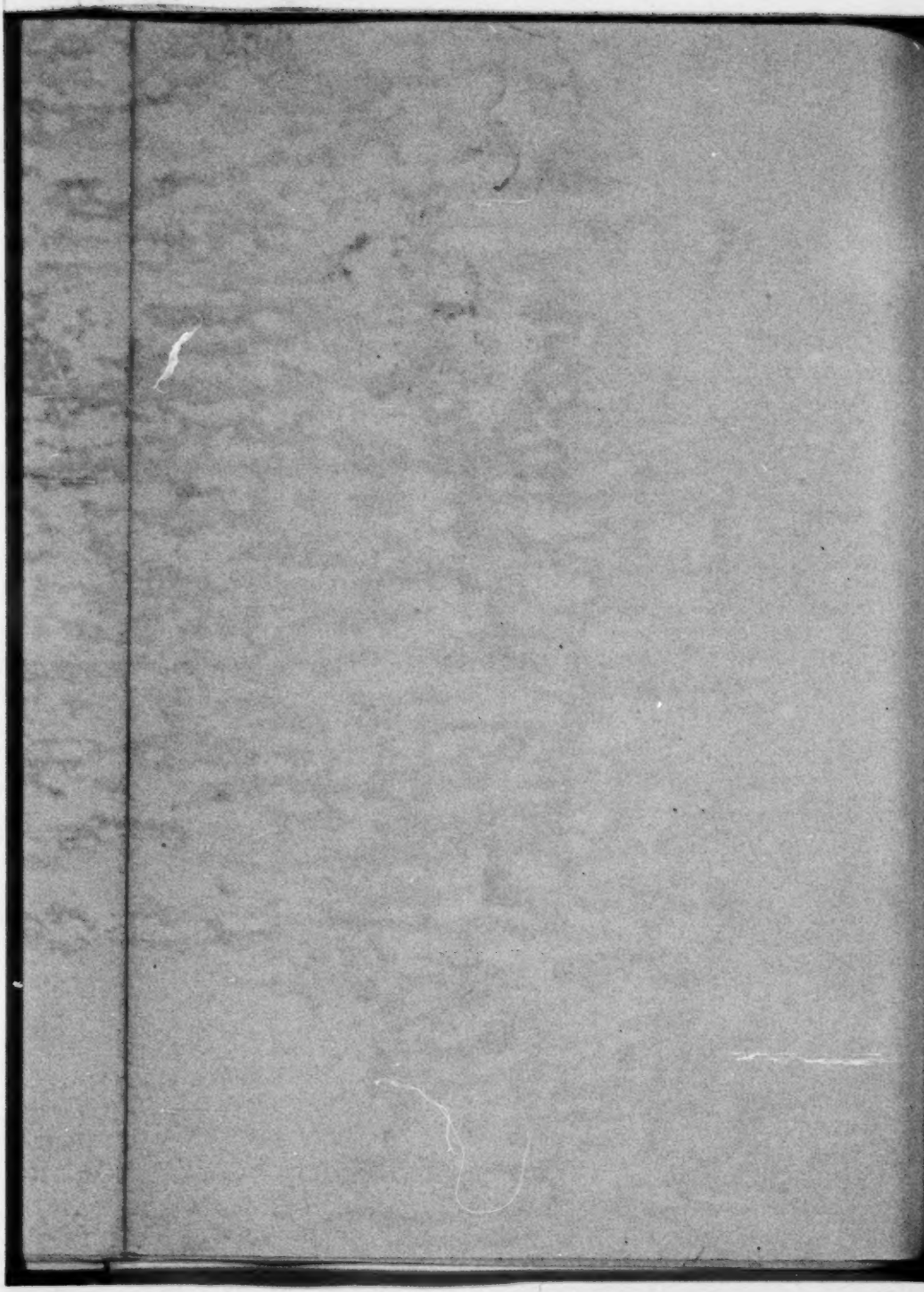
COMMITTEE ON CLAIMS

Amount claimed... $.....

Amount allowed... $.....

Amount rejected... $.....

287



251 Mr. Ellick: We offer in evidence Interrogatory Number 35 of the original interrogatories and that much of the answer of A. B. Allen to the original interrogatories which appear in his answer 35 as follows: "Yes the following letters and telegram are copies from the original letter dated December 31, 1926 to the Collector of Internal Revenue from C. R. Nash, Assistant to the Commissioner." We also offer in evidence the following numbers of the original interrogatories and the answers of A. B. Allen, Collector of Internal Revenue, thereto. Interrogatory Number 40 and 42.

The answers to said Interrogatories 35, 40 and 42, were received in evidence without objection and are as follows:

Answer to Interrogatory Number 35.

A. B. ALLEN, Collector of Internal Revenue, answered Original Interrogatory Number 35:

That he had in his possession on under his control the following letters and telegrams or copies thereof between the Collector of Internal Revenue at Omaha, Nebraska, and the Commissioner of Internal Revenue, respecting the taxes claimed to be due from Updike Grain Company under the Revenue Act of October 3, 1917 or respecting the review and audit made of the books and records of said Updike Grain Company in October, 1918 and June, 1919 as follows:

"Original letter dated December 31, 1926 to Collector of Internal Revenue from C. R. Nash, Assistant to the Commissioner." A copy of said letter is hereinbefore set forth as part of the answers of D. H. Blair to interrogatories of defendants.

Answer to Interrogatory Number 40.

As disclosed by the records of the Collector's office written notice and demand for payment was mailed to Updike Grain Company for the payment of the tax of $373,-
252 911.54 under date of February 10, 1920.

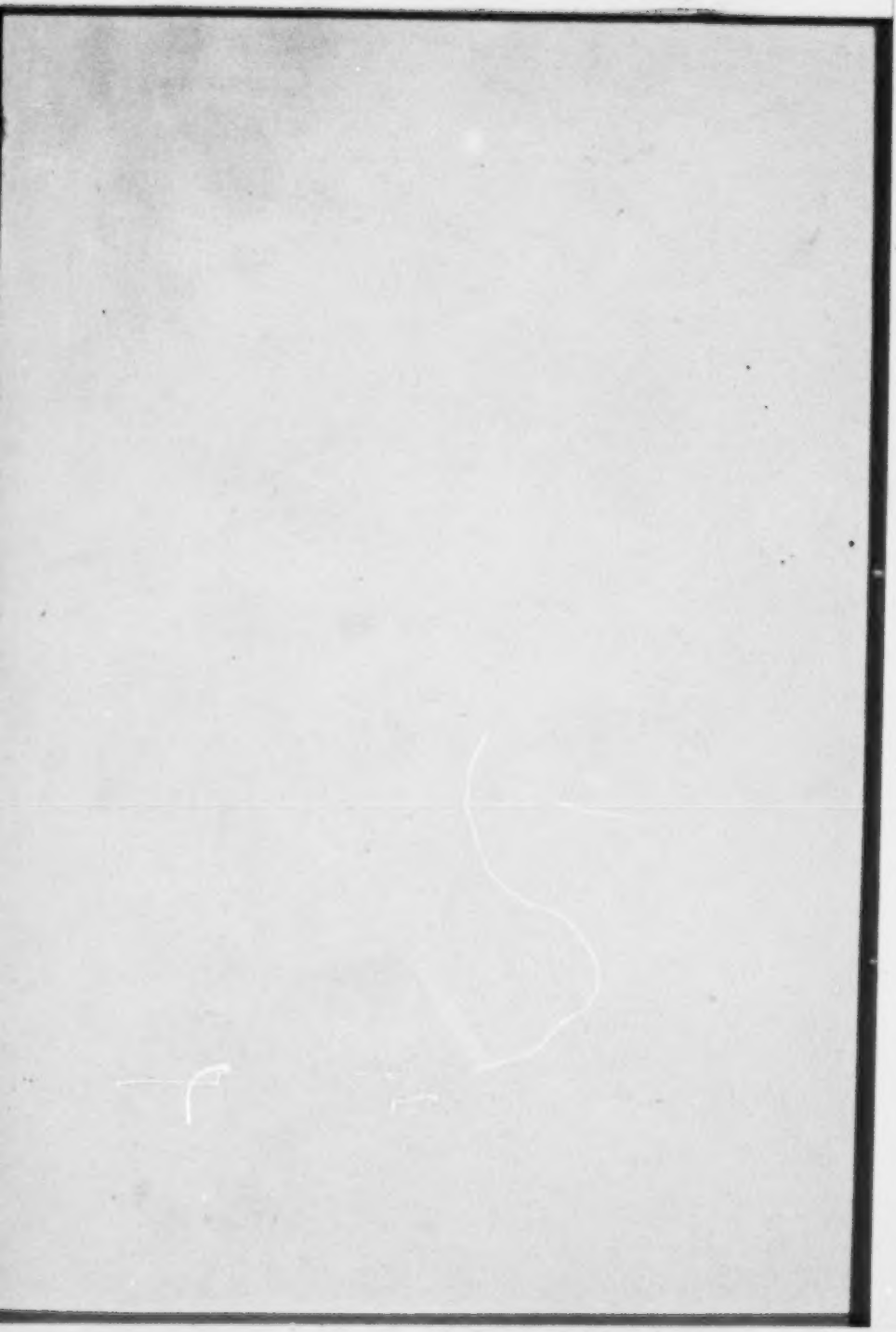
Answer to Interrogatory Number 42.

After diligent search original letter of Updike Grain Company to George L. Loomis, Collector of Internal Revenue, Omaha, Nebraska, dated October 2d, 1917, can not be found.

Mr. Ellick: We offer in evidence Additional Interrogatory Number 10 and the answer of A. B. Allen, Collector of Internal Revenue, thereto, Received without objection.

Answer to Additional Interrogatory Number 10.

Copies of original assessment list and certificate of assessment of $373,911.54 against the Updike Grain Company sent from the office of the Commissioner of Internal Revenue to the Collector of Internal Revenue at Omaha, Nebraska, in November, 1919 or January or February 1920, are attached hereto.



UNITED STATES INTERNAL REVENUE

ASSESSMENT LIST

TRANSFERRED TO CONSOLIDATED LIST

District NEBRASKA — INCOME TAX — Date JANUARY 1920

	NAME AND ADDRESS OF TAXPAYER	DESCRIPTION OF ITEM	TOTAL TAX	DATE PAID	REMARKS
0	UPDIKE GRAIN CO. 625 OMAHA GRAIN EXCHANGE, OMAHA, NEBR.	7/31/16 1031 R.A.R.10/26/18	2 790 08	2/16/20	
1	" "	6/30/17 11 MOS.39500995 VA R.A.R.6/30/19	373 911 54		11-17-8-16-21 2-373911
7					
8					
9					
		TOTAL	376 697 62		
		GRAND TOTAL	423 974.39		

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Approved by the Comptroller of the Treasury
July 24, 1919

TRANSFERRED TO CONSOLIDATED LIST.

TAX LIST REPORT

ADDITIONAL ASSESSMENTS.

District: NEBRASKA List: INCOME TAX (Kind of tax.) JANAURY 1920 (Month or section.) Date:

TO THE COMMISSIONER OF INTERNAL REVENUE:

I hereby certify that the following transactions affecting the tax list described above have been recorded on my books this month:

....., Collector.

LINE NO.	TAXES COLLECTIBLE		AMOUNTS	✓	
1	Balance brought forward from last report		$		
2	Returns filed during month				
3	Revisions in returns made by Collector (increases)				
4	Received from Commissioner	Form 23 D, dated ..... $			429 974 31
		Form 23 A, dated ..... $			
5	Transfers from other Districts	..... (District.) $			
		..... (District.) $			
		..... (District.) $			
6	Returned checks (charged to taxpayers' accounts)				
7	Refund vouchers (charged to taxpayers' accounts).	Paid by Collector, per abstract ..... $			
		Certified to Commissioner for payment, per abstract ..... $			
8	Total to be accounted for				429 974 31
9	Collections				
10	Transfers to other Districts	..... (District.) $			
		..... (District.) $			
		..... (District.) $			
11	Abated during month	By order of Commissioner ..... $			
		By Collector, per abstract ..... $			
12	Balance of Taxes Collectible at close of month		$		$

ABATEMENT CLAIMS PENDING

13	Balance brought forward from last report	$	$
14	Abatement claims filed during month		
15	Total to be accounted for		
16	Abatement claims allowed during month (see Item 11)		
17	Abatement claims rejected during month — By order of Commissioner ..... $ / By Collector ..... $		
18	Balance of abatement claims pending	$	$

COMMISSIONER'S CERTIFICATE

I HEREBY CERTIFY that I have made inquiries, determinations, and assessments of the taxes, penalties, etc., of the above classification specified in the list and find that the amounts of taxes, penalties, etc., stated, as corrected by the statement of differences, are due from the individuals, firms, and corporations opposite whose names such amounts are placed and that the amount chargeable to the Collector is as follows:

	TOTAL DEBITS	TOTAL CREDITS	
As reported by Collector	$ 429 974 310	$	$ 429 974 31
As audited by Commissioner			
Differences shown on Form 23 D, No.			

Dated at Washington, D. C., JAN. 27, 1920. Acting Commissioner of Internal Revenue.

RECD - 32 - 29
FEB 6 1920
DIST. NEBRASKA

JAN 29 1920
AUDITOR OF ACCOUNTS

3

255 Mr. Ellick: We offer in evidence the following original interrogatories and the answers of James J. Drakeford thereto. Interrogatories 33, 57 and 69. Received without objection.

Interrogatory No. 33. "Have you in your possession or under your control, any other correspondence between John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, and Commissioner of Internal Revenue, respecting the taxes claimed to be due from the Updike Grain Company, under the Revenue Act of October 3d, 1917, or respecting the review and audit made of the books and records of said Updike Grain Company in October, 1918, and June, 1919, respecting said taxes."

Answer to Interrogatory Number 33 by James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska.

A diligent search of the files of this office fails to disclose any correspondence described by this interrogatory.

Answer to Interrogatory Number 57.

256 After diligent search no record of letter of Gorton Roth to James J. Drakeford, dated February 22, 1924, can be found in this office.

Answer to Interrogatory Number 69.

After diligent search no letter of the Commissioner of Internal Revenue to John J. Gillin, Revenue Agent in Charge, dated November 20, 1919, relative to investigation of the income tax returns for the years 1913 to 1917 inclusive of Updike Grain Company can be found in this office.

Mr. Ellick: We offer in evidence the following interrogatories of the original interrogatories and the answers of T. F. Langley, Head of the Proving Section, Income Tax Unit. Interrogatories Number 5, 10, 11, 13 and 19. Received without objection.

T. F. Langley answered Interrogatory Number 5 as follows:

The amount of additional tax noted upon said return namely the original income tax return of the Updike Grain Company of Omaha, Nebraska, for the fiscal period ending June 30, 1917, subscribed July 24, 1917 and filed July 25, 1917, was computed and determined by the Corporation Audit Divi-

sion, Income Tax Unit; the determination being first made by an auditor of said division, based upon a report received from the Revenue Agent in Charge at Omaha, Nebraska under date of October 26, 1918 and a supplemental report from the same source, dated June 30, 1919, and thereafter approved by the Head of said division.

Answer to Interrogatory Number 10.

The memorandum of the amount of tax to be assessed was placed (as stated) upon the return of the Corporation Audit Division of the Income Tax Unit. There is no record of the name of the particular auditor who made said notation.

257 Answer to Interrogatory Number 11.

The procedure above mentioned was in accord with the custom and practice then prevailing in the office of the Commissioner of Internal Revenue respecting the assessment of additional income and war profits taxes.

Answer to Interrogatory Number 13.

As heretofore stated, no assessment was endorsed upon any income tax return, although as explained in detail above, it was the practice of the Audit Division, when it determined that there was an additional tax due from a tax-payer, to note the amount to be assessed upon a return filed by the taxpayer for the taxable year in question.

Answer to Interrogatory Number 19.

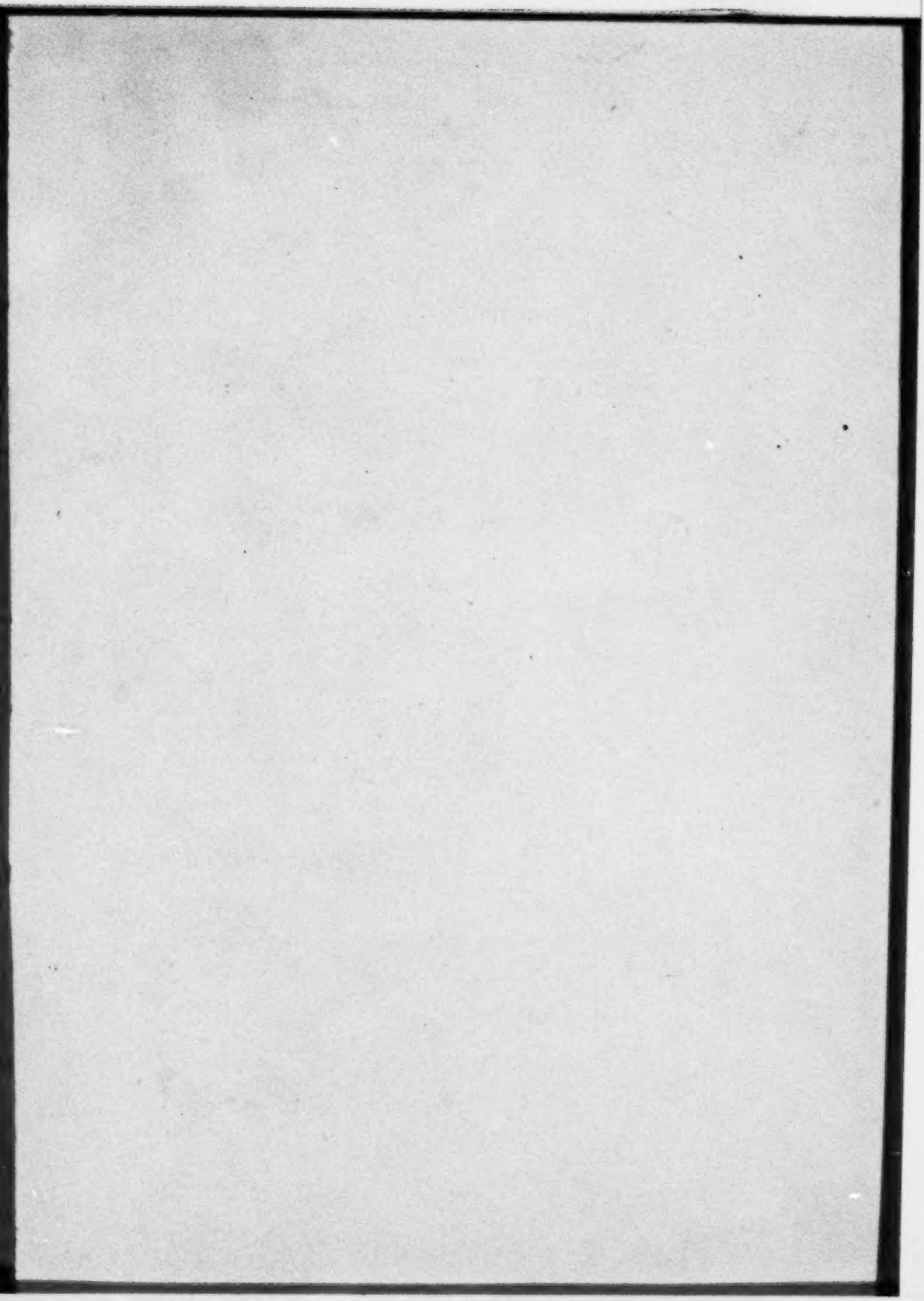
The procedure in making said additional assessment was in accordance with the practice prevailing in the Income Tax Unit with respect to assessments of like nature against other taxpayers.

MR. GORTON ROTH further testified as follows:

Mr. Ellick: "Mr. Roth, I call your attention to exhibit number 17. State what that is." To which witness answered: "It is a letter received by the Updike Grain Company from J. H. Callan, Assistant Commissioner, under date of September 5, 1919."

Mr. Ellick: We offer in evidence Exhibit number 17. Received without objection.

Exhibit number 17 received in evidence is as follows:



TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

IT:IA:C1
GTR

September 5, 1919.

41

Updike Grain Company,

Omaha, Nebraska.

Sirs:

Please furnish this Bureau, for use in connection with the adjustment of claims filed by individual stockholders of your company, an affidavit giving the following information in regard to dividends received by such individuals during 1917 and stated to have been declared out of the surpluses accumulated during different years and consequently taxable at different rates under the Income Tax Act of October 3, 1917.

1. Amount of surplus and earnings accumulated each year out of which dividends were paid.

2. Gross amounts of dividends paid each year, and rate declared on each kind of stock.

3. Date dividends were determined and made available to stockholders.

4. Whether or not at the time the dividends were declared they were specifically declared to have been from earnings or profits accumulated during any particular year; if so, please state the year.

5. Amount of net earnings from January 1, 1917, to date of payment of the dividends in that year.

6. Number of shares of outstanding stock, kind of stock, and par value per share.

This information will be placed on file for reference in connection with any other claims involving the same question.

Respectfully,

J. H. CALLAN,
Assistant to the Commissioner.
By

C M Johnson
Acting Chief of Section.

307

259 The attention of witness Gorton Roth was next called to Exhibit number 18, pages one and two; and asked: "Is that the answer that you wrote to the letter, exhibit, and mailed to the address stated in the letter, being in answer to Exhibit 17?", to which witness answered: "It is the letter that I sent personally in answer to that letter."

Mr. Ellick: We offer in evidence Exhibit number 18, pages one and two. Received without objection.

Exhibit number 18 received in evidence is as follows:

Omaha, Nebr.
September 8th, 1919.

Mr. C. M. Johnson,
Acting Chief of Section,
J. H. Callan,
Asst. to Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Referring to your letter of September 5th, File IT-IA:C1 GTR, addressed to the Updike Grain Company, beg to advise that the Updike Grain Company is not and has not been in existence since August, 1917.

However, in answer to your letter will state that the writer was the last Secretary of the Updike Grain Company and that the old records of the Company showsas follows:

(1) The company carried over no surplus from the previous year. For the year ending June 30th, 1917 the company earnings distributed in dividends to the stockholders were $2,200,000.

(2) The company paid to stockholders during 1917 $2,100,000 in dividends, of which $1,000,000 was earned during the year 1916 and $1,100,000 during the year 1917.

(3)

March 5, 1917	20%	cash	$200,000.00
April 9, 1917	10%	cash	100,000.00
April 16, 1917	10%	cash	100,000.00
April 30, 1917	100%	stock	1,000,000.00
June 26, 1917	35%	cash	700,000.00

The above dividends were paid to stockholders the date declared.

(4) Dividends were all declared payable out of earnings of current fiscal year as those were the only earnings undistributed out of which they could have been declared.

(5) The company had no cut-off during its fiscal twelve months period ending June 30th, 1917, and for all purposes counted that the earnings were accumulated pro-rata over the entire period, which would put one-half of the earnings in the year 1916 and one-half in the year 1917. As stated above the company had no cut-off on January 1st, 1917, but the earnings for the half year, January 1st, 1917 to June 30th, 1917, were $1,200,000.

(6)

Period	Number of Shares	Kind	Par Value
1/1/17 to 4/30/17	10,000	Common	$100.00
4/30/17 to 6/30/17	20,000	Common	100.00

Yours truly,

R/A

262 The witness was next asked whether Exhibit number 19, pages one and two, was received by him from John J. Gillin, Revenue Agent in Charge, on or about the date it bears, addressed to the Updike Grain Company, to which the witness answered: "Yes sir".

Mr. Ellick: We offer in evidence Exhibit number 19, pages one and two. Received without objection.

Exhibit number 19 received in evidence is as follows:

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

November 24, 1919.

Updike Grain Company,
Omaha, Nebraska.

Gentlemen:

This office is in receipt of letter from the Commissioner of Internal Revenue, under date of November 20, 1919, relative to investigation of your income returns for the years 1913 to 1917, inclusive, made by Revenue Agent L. C. Smith, which advises as follows:

"An error exists in computing gross income in your amended figures for fiscal years ended July 31, 1915, and July 31, 1916. For 1915, gross income, $442,395.00, is understated by $5,000.00, and gross income for 1916, $609,459.54, is overstated by $5,000.00. Correcting these errors, additional tax due for 1915 and 1916 would be $145.81 and $3,015.53, respectively, and not $95.81 and $3,094.70 as shown.

"The additional tax due from the corporation for the eleven months ended June 30, 1917, $373,911.54, is correctly stated in your supplemental report of June 30, 1919.

"Since the corporation failed to file a claim for the refund of overpayment for 1913 amounting to $258.35, this office is barred by Section 252 of Revenue Act of 1918, in offsetting the amount against the additional taxes found to be due.

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"The overpayment for 1914 amounting to $113.01 will be offset against the additional tax $145.81 due for 1915, leaving a balance of $33.80 due for this year.

"A summary of additional taxes for years follows:

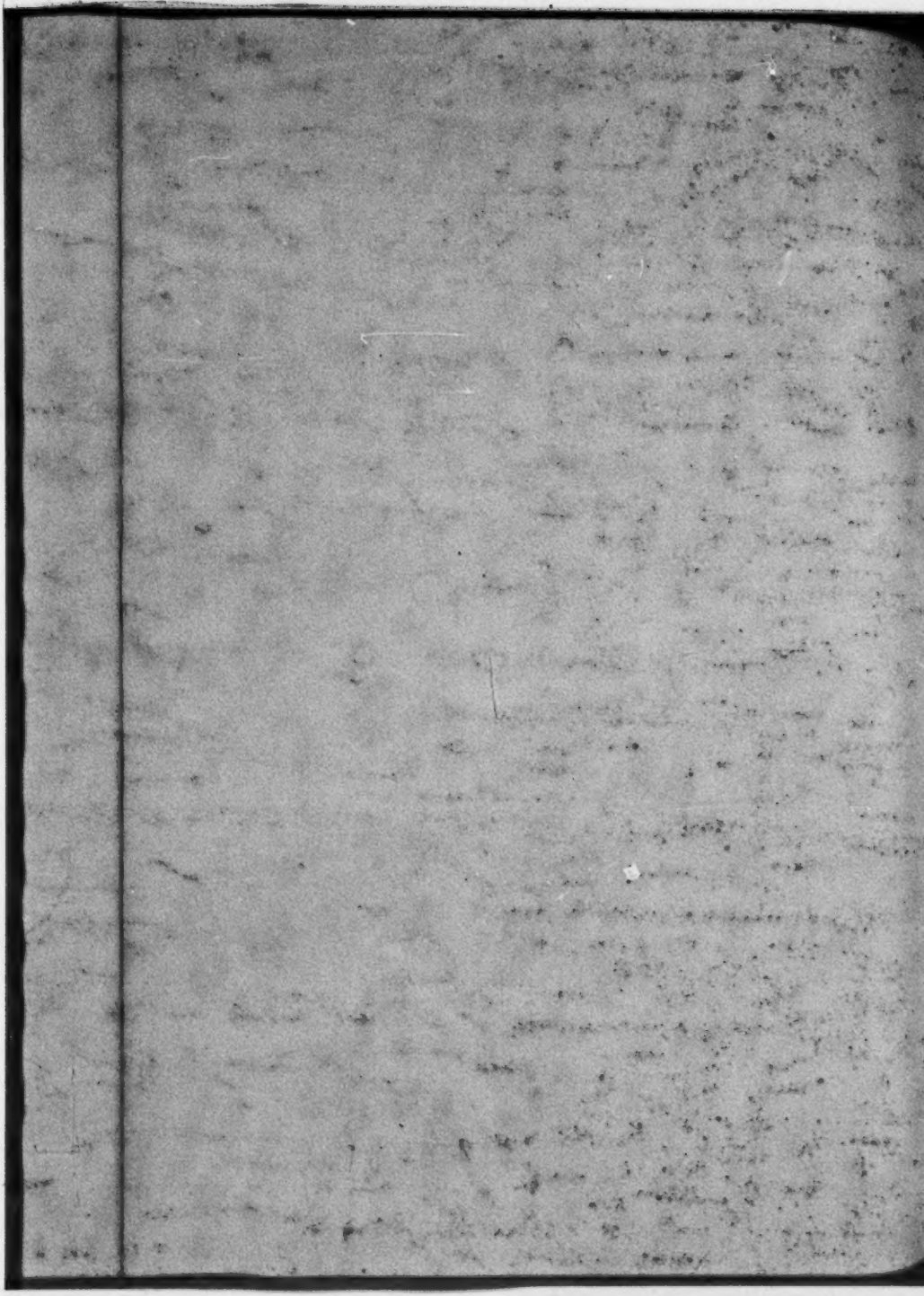
1915	$ 33.80
1916	3,015.53
1917,	373,911.54
Total,	$376,959.87 "

The Collector in your District will advise you as to the time and manner of payment of net additional tax.

MCW/D

Deputy Agent in Charge.

4-19-22



265 Calling the attention of witness Gorton Roth to Exhibits Numbers, 20, 21, 22, 23, 24, 25 and 26, he was asked if that was received by him from John J. Gillin on or about the date it bears, addressed to N. B. Updike, to which he answered "Yes sir, it was."

Mr. Ellick: We offer in evidence Exhibits numbered 20 to 26 inclusive, being the letter of John J. Gillin dated November 24, 1919, and a copy of the report of the Revenue Agent at that time.

The Court: "That is the L. C. Smith report?"

Mr. Ellick: "Yes, where they called it to the taxpayer's attention for the first time."

The offered exhibits were received in evidence, and are as follows:

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

November 24, 1919.

Mr. N. B. Updike,
625 Grain Exchange Bldg.,
Omaha, Nebraska.

4 20

Dear Sir:

There is enclosed, as requested by your Mr. Roth today, two copies of the following, as shown by the files of this office, in reference to the investigation of the Updike Grain Company:

Amended Return, as made up by the investigating officers for the year 1913 and the fiscal years 1914, 1915, 1916 and 1917;

Synopsis of Amended Return for Excess Profits for the fiscal year 1917; and

Revised Tax Computation for the fiscal year 1917, in accordance with Department letter.

Respectfully,

MJH/D

Revenue Agent In Charge.

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A M E N D E D R E T U R N S

1913 - Amended Return.

Item 3,		$105,136.03
4	$45,939.42	
6a	10,063.55	
7	697.66	56,699.63
Net Income,		$ 48,436.40
Net Income reported,		74,351.38
Excessive net income reported,		$ 25,834.98
Refund due, - - - - - - - -		$ 358.35

4 21

Differences:

The original return was for the period July 1, 1912, to July 1, 1913.

As the company had no permission at that time to render a return on the fiscal year basis, it was necessary to adjust the items of income and deductions, to the calendar year by deducting one-half of the gross income and deductions reported, and adding the gross income and deductions from July 1 to Dec. 31, 1913.

Amended Return
Fiscal Year ending July 31, 1914.
(7 Months' Business)

Item 3		$ 38,918.16
4	$30,234.87	
6a	4,915.58	
7	593.67	35,734.13
Net Income,		$ 13,184.04
Net Income reported,		24,484.64
Excessive net income reported,		$ 11,300.60
Refund due, - - - - - - -		$ 113.01

Differences:

The original return was for the period July 1, 1913, to July 31, 1914, instead of for the 7-months' period ending July 31, 1914. It was necessary to adjust the gross income and deductions to this basis, using 7/13 of the items reported.

Amended Return
Fiscal Year ending July 31, 1915.

Item 3		$443,295.00
4a	$158,617.18	
b	4,650.00	
5a	318.17	
b	37,473 30	
6a	45,583.63	
7	5,103.33	251,745.61
Net Income,		190,549.39
Net Income reported,		180,968.70
Additional net Income,		$ 9,580.69
Additional tax, - - - - -		$ 95.81

Differences:

The original return was for the period July 31, 1914, to June 30, 1915. It was necessary to adjust the income and deductions to the fiscal years designated, by adding the income and deductions for July 1915, determined by taking 1/12 of the gross income and deductions of the fiscal year book closing for the period from June 30, 1915, to June 30, 1916.

Amended Return
Fiscal Year ending July 31, 1916

Item 3,		$809,459.54
4	$180,378.95	
5a	930.38	
6a	58,794.47	
7	6,401.71	446,405.51
Net Income,		$363,054.03
Net Income reported,		174,968.30
Additional net Income,		$188,085.73

Tax @ 1%,	$3,630.54
Additional tax @ 2%	2,117.82
Total tax liability,	$5,748.36
Total tax paid,	2,653.66
Additional tax due, - - - - -	$3,094.70

There appears to be an error in the computation of the additional assessment at 2% shown on the abstract of return for this year.

Differences (1916):

The original return was for the period June 30, 1915 to June 30, 1916. It was necessary to adjust the gross income and deductions to the fiscal year designated, by deducting the income and deductions for July 1915 and adding that of July 1916, determined by taking 1/12 of the total gross income and deductions as shown by the book closings for the fiscal years ending June 30, 1916, and June 30, 1917.

Fiscal Year Ending June 30, 1917.

Copy of Return.

Item 1,			$2,000,000.00
2			1,009,671.91
3a		$3,036,898.56	
c		56,352.36	
d		643,791.55	
e		116,657.66	$3,853,600.13
4a	$375,468.56		
5a	1,377.06		
6a	98,308.35		
7	6,657.09		481,603.08
Net Income,			$3,371,997.05
Tax @ 2%, - - - - -			$ 47,439.94

Amended Return.

Item 1,			$2,000,000.00
2			1,012,771.91
3a		$1,867,157.01	
c		51,564.67	
d		590,143.26	
e		106,936.19	$3,615,800.13
4	$344,177.70		
5a	1,170.64		
6a	90,018.82		
7	6,102.33		441,469.49
Net Income,			$3,174,330.64
Less Dividends (3rd)			590,143.26
Income less dividends			$1,584,188.38

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(1917 Amended Return Cont.)

Income less dividends (brought forward)		$1,584,188.38
6/11 - 1917 Proportion,		864,108.75
Less Excess Profits Tax,		459,081.32
Taxable at 4%		405,031.43
Excess Profits Tax,		$459,081.32
Income Tax @ 3%		34,304.99
Income Tax @ 4%		16,300.86
Total tax liability,		$509,587.17
Total tax paid:		
Income tax,	$47,439.94	
Ex. Profits tax,	96,583.62	144,023.56
Additional tax due, - - - - -		$365,564.61

3% tax on net income for fiscal period less EPT 1917 portion.

Differences:

The original return included the business from June 30, 1916, to June 30, 1917, as per book closings of those dates. The end of the fiscal year was re-designated as June 30, and the company given permission to make return on that basis, and the return should have included only eleven months' business from July 31, 1915, to June 30, 1917. It was necessary to adjust the gross income and deductions to that period by eliminating the income and deductions for July 1916, determined by taking 1/12 of the total gross income and deductions of the book closing for the period June 30, 1916, to June 30, 1917.

RETURN FOR FISCAL YEAR (11 months) ENDING 6-30-17

SYNOPSIS OF AMENDED RETURN.

	Invested Capital.	Net Income.
1911	$1,101,771.11	$ 58,358.73
1912	1,007,324.06	5,367.47
1913	1,131,334.89	None
Totals,	$3,240,430.06	63,726.19
1917, 1/12ths,	933,740.81	$1,584,188.38

Percentage of pre-war earnings to invested capital,	2%
Percentage used in computing deduction,	7%
7% of 11/12 of Invested Capital taxable year,	$ 65,361.86
11/12 of Specific Deduction,	2,750.00
Total deductions, - - - -	$ 68,111.86

Computation of Tax.

15%	$140,061.13	$68,111.86	$ 71,949.26	30%	$14,389.85
30 to 20%	46,687.04		46,687.04	35%	11,671.76
20 to 25%	46,687.04		46,687.04	35%	16,340.46
35 to 33⅓	74,699.26		74,699.26	45%	33,614.67
Over 33⅓	1,276,053.92		1,276,053.92	60%	765,632.35
	$1,584,188.38	$68,111.86	$1,516,076.53		$841,649.09

6/11ths of tax for period Jan. 1 to June 30, 1917, $459,081.32

Difference in Invested Capital

Invested Capital, 1917 Reported,	$3,100,844.05
Invested Capital, 1917 Revised,	1,018,626.34
Difference,	$1,082,217.71
Invested capital reported included $1,000,000 stock dividends issued April 30, 1917, out of fiscal year 1917 earnings,	1,000,000.00
Invested Capital reported included average amount of stock in other companies in excess of average indebtedness,	279,884.12
	$1,279,884.12
Less July 1916 earnings, not included in invested capital reported,	197,666.41
Net difference, - - - - -	$1,082,217.71

331

Revised Tax Computation

Net Income revised,		$3,174,330.64
Less Excess Profits tax,		459,081.32
Amount subject to 3% tax,		$1,715,249.32
Net Income revised,		$3,174,330.64
Less Dividends,	$590,142.26	
	459,081.32	1,049,223.58
Balance,		$1,125,107.06
Subject to 4%,		$ 613,694.75

Excess Profits tax,		$459,081.32
Tax at 3%		34,304.97
Tax at 4%		24,547.79
Total tax liability,		$517,934.10
Total tax paid;		
Income tax,	$47,439.94	
Ex.Prof.Tax,	96,582.62	144,022.56
Additional tax,		$373,911.54
Additional tax previously reported,		365,564.61
Additional tax due,.....		$ 8,346.93

c/ 26

273 The attention of the witness, Roth, was next called to Exhibit number 27, and he was asked to state if that is a notice he received from the Collector of Internal Revenue respecting the taxes claimed in this action dated July 16, 1921. That is, the Updike Grain Company, to which he answered: "Yes sir, it is". It was received on or about that date.

Mr. Ellick: We offer in evidence Exhibit number 27. That is on form 1-17-A. Witness excused.

Exhibit number 27 received in evidence is as follows:

INCOME, WAR-PROFITS, AND EXCESS-PROFITS TAX

NOTICE AND DEMAND FOR TAX

Form 1-a-Revised Jan., 1920

UNITED STATES INTERNAL REVENUE SERVICE

OLD BALANCE	DATE	TAX	AMOUNT PAID	BALANCE DUE	REMARKS
373811.54 43564.96 Interest.				373811.54 43564.96 Int. 417476.50	Jan (1920) P-14-I-3 Claim for abatement rejected by Comm- Int. Rev.

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from July 26,1921 until paid.

Date July 16,1921

Updike Grain Company,
612 Grain Exchange Bldg.,
Omaha, Nebraska.
Jan (1920) P-14-I-3

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at Omaha, Nebraska not later than July 26,1921

Date

To the Collector of Internal Revenue:

I inclose herewith the sum of $

in payment of the tax shown above.

Name Updike Grain Company,

Address 612 Grain Exchange Bldg., Omaha Nebr.

COLLECTOR'S PAID STAMP

4127

RETURN THIS FORM WITH REMITTANCE

275 Examined

By Mr. Ellick:

JAMES J. DRAKEFORD, called as a witness for the defendants, being first duly sworn, testified that he is Revenue Agent in Charge located at Omaha, Nebraska, of the Bureau of Internal Revenue, and that he has charge of the files and records of his predecessor, John J. Gillin. That he has not in his files the directions that were sent to John J. Gillin in the Fall of 1919 to audit certain returns of the Updike Grain Company that was referred to in the testimony of L. C. Smith. "That kind of correspondence is not kept over two or three years." Witness never saw those particular instructions but has seen similar instructions, and "we often issue similar instructions." In other words, we have a return for 1924 and check up 1924, 1925 and 1926 very often, or one at a time. Witness is familiar with the handling of returns in the Bureau of Internal Revenue and was at one time connected with the Washington Bureau. Witness' attention being called to the fact that on these returns that have been offered in evidence there is a rubber stamp "Return audited", testified that the auditor in the final audit, whoever handles that, puts his stamp on and that shows it has been audited and approved. That is all. At that time this was put on in the Bureau of Internal Revenue at Washington. Under present procedure those are audited in our office and sent down. Accepted by the Field office. Witness excused.

Examined

By Mr. Ellick:

GORTON ROTH, recalled as a witness for the defendants, was further examined by Mr. Ellick:

Witness' attention being called to Exhibit number 13, which is the letter to George L. Loomis, dated December 18, 1917, requesting supplemental blanks for the Updike
276 Grain Company, witness stated that he received the form 1031 revised pursuant to that letter, upon which he made the final return of the Updike Grain Company which he filed in January, 1918.

Copy of the report of L. C. Smith and the other letter of the same date which has just been identified as Exhibits numbers 20 to 26, inclusive, enclosed in the letter of November 24, 1919, were shown to Mr. Updike and were examined by witness.

Witness' attention was called to Exhibit number 28, being a letter from A. B. Allen, Collector of Internal Revenue, to N. B. Updike under date of May 8, 1923, and testified that that letter was received by Mr. Updike on or about the date it bears.

Mr. Ellick: We offer in evidence Exhibit number 28.

Mr. Blaisdell: Plaintiff objects to the offer of Exhibit number 28 for the reason that it is absolutely immaterial and irrelevant to any issue in this case and merely encumbers the record.

Complainant's objection was overruled and an exception duly allowed.

Exhibit number 28 was received in evidence over complainant's objection and is as follows:

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

IN REPLYING REFER TO

May 8,1923.

Mr. N. B. Updike,
Grain Exchange Bldg.,
Omaha, Nebraska.

My dear Mr. Updike:

Under date of April 27, 1923, I addressed a letter to the Commissioner of Internal Revenue, Washington, D. C., asking for instructions as to procedure in the settlement of a number of cases in which you are interested involving additional taxes, particularly cases relating to the Updike Grain Company, Missouri Valley Elevator Company, Arlington Lumber and Grain Company, and Hynes Elevator Company.

I stated to the Commissioner the pertinent facts relating to these cases, and under date of May 2, 1923, I have a reply from H. F. Mires, Acting Deputy Commissioner, in which he acknowledges receipt of my letter of April 27th, and says in substance that in view of the fact that the corporations referred to were all dissolved and the respective assets distributed among the stockholders, etc., he has requested the Solicitor of Internal Revenue to prepare an opinion relative to the matter and upon receipt of said opinion, he, (the Commissioner), will communicate with me again.

Very truly yours,

A. B. Allen
Collector.

ABA-MH

278 Attention of witness Roth, was called to Exhibit number 29, and he testified that that letter was received from D. H. Blair, Commissioner, addressed to Mr. Updike under date of February 12, 1924. It was received on or about the date it bears.

Exhibit number 29 was offered and received in evidence without objection and is as follows:

TREASURY DEPARTMENT

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

WASHINGTON

FEB 12 24

SOL:C:GAB
197104

Mr. N. P. Updike,

Omaha, Nebraska.

Sir:

I have considered the proposition submitted by you in behalf of Updike Grain Co., Missouri Valley Elevator Co., Arlington Lumber & Grain Co., and Hynes Elevator Co., Omaha, Nebraska, on the 25th day of May, 1923, through the Collector of Internal Revenue at Omaha, Nebraska, for a compromise of their liabilities on account of unpaid additional corporation income and excess profits tax for fiscal 11-month period ended June 30, 1917, assessed against the Updike Grain Co. in the amount of $373,911.54, with penalty and interest; for fiscal 10-month period ended May 31, 1917, assessed against the Missouri Valley Elevator Co. in the amount of $34,561.92, with penalty and interest; for fiscal 10-month period ended May 31, 1917, assessed against the Arlington Lumber & Grain Co. in the amount of $1526.47, with penalty and interest; and for fiscal 11-month period ended June 30, 1917, assessed against Hynes Elevator Co. in the amount of $23,915.39, with penalty and interest, and have decided to reject the same.

The case will proceed as if no offer had been made.

Respectfully,

D. H. Blair

Commissioner.

xx

429

280 Referring to the income tax return prepared by L. C. Smith on form 1031 revised, January, 1918, and form 1103, which is attached to government's exhibit number 2, the witness, Roth, testified that the originals of those returns were not presented to him for signature by Mr. L. C. Smith, and that he, the witness, never saw the originals at any time.

Mr. Updike was also interested in the Arlington Lumber and Grain Company, which was dissolved just a little before the Updike Grain Company; witness thinks it was the early part of August or the latter part of July, 1917. The Arlington Lumber and Grain Company did business on a fiscal year basis, "the same as the Updike Grain Company." Returns were made for that company on the same form that they were made for the Updike Grain Company. Witness made no additional returns for the Arlington Lumber and Grain Company upon forms 1031 or 1103 or 1095, revised, January, 1918; made no report after the October 3, 1917 Act was passed."

L. C. Smith did not make an audit of the Arlington Lumber & Grain Company at the time he made the audit of the Updike Grain Company. No field audit was made of that company under the October 3, 1917 act, but the Government computed, determined and assessed an additional tax against the Arlington Lumber & Grain Company under the October 3, 1917 act.

Cross-Examination

By Mr. Blaisdall:

When witness spoke of these returns that were made for the Arlington Lumber and Grain Company and some of those other corporations, witness refers to returns that were made under the 1916 Act and the Act of March 3, 1917.

No returns were ever asked for from any of the Updike corporations under the October 3, 1917 act, and no re-
281 turns were filed for the Updike Grain Company after the act of October 3, 1917, was passed, covering the fiscal period ending June 30, 1917, except the blank and the letter on March 26, 1918, which is Exhibit 1. When L. C. Smith furnished his audit of the Updike Grain Company I did not see the blank forms of return which he filled out and prepared and put some figures on; he never showed them; he did not present them to me. The other Updike corporations I referred to were the Arlington Lumber & Grain Company, Missouri Valley Elevator Company and Updike Elevator Company. They all had fiscal years ending the same

time as the Updike Grain Company, and filed exactly the same thing.

Redirect Examination

By Mr. Ellick:

When L. C. Smith came to the office of the Updike Grain Company and to my office for the purpose of making the audit that has been referred to in his report of October 25, 1918, he said he wanted to audit our returns covering 1913 down to 1917. Witness furnished him the necessary books to make these audits, everything he asked for. He told us he had no information on the 1917 return and asked us if we had copies of our returns. I told him we did and furnished them to him. They were copies of the returns, Exhibit 7, pages 1 and 2, Exhibit 8, Exhibit 9 and Exhibit 14, pages 1 and 2. The first time that any Government official ever asserted that returns had not been filed under the October 3, 1917 act was when the Missouri Valley Elevator case came up for trial in this court. That was in June, 1924.

Examination

By Mr. Ellick:

NELSON B. UPDIKE, witness for defendants, being duly sworn, testified that he is one of the defendants in this case and that he was President of the Updike Grain Company up to the time of its dissolution in August, 1917. Witness
282 heard the testimony of L. C. Smith and Gorton Roth with reference to the returns that L. C. Smith made at the time he made an audit of the books in October, 1918.

L. C. Smith did not at that time present to witness any income tax return for signature of witness, nor did witness see any income tax return prepared by L. C. Smith at that time.

Shortly after the receipt of Exhibit 28, being a letter dated May 8, 1923, I received a telephone communication from Mr. Allen saying he wanted to see me down at his office about the collection of these various taxes. I went to his office pursuant to that communication and he stated that these cases had been dragging along for some time and suggested that we offer a compromise. Not only this case but several others. And I told him that any offer that I would make in compromise would be so small that really it would probably be insulting, and I rather objected, but he kept on and finally said you ought to make an offer of an amount that would be around about what it might cost you to defend this in case of a law suit and I said, well, I said, if you will consider an offer along those lines I will make one. And he

said he would. And, I offered him ten thousand dollars. He had another man with him in consultation, and they consulted with each other after I made the offer and both agreed that they would approve the offer. And then they asked me for a check. Well I says, I don't like to do this without seeing my lawyers. Well they said there was only one thing to do, just write a check, and you have to sign a regular blank form, and so I signed the blank form and gave,—not the blank form but signed the form filled out and then gave them a ten thousand dollar check with the understanding that they would not cash the check unless it was accepted in full for the claim. That I did not,—I told him I did not want to pay ten thousand dollars and then have it endorsed as part
283 payment of the claim. And he accepted it in that way, and an offer of compromise was filled in by Mr. Allen or someone in his office upon a form Mr. Allen had which is the offer of compromise that is attached to the answers of D. H. Blair to the original interrogatories. The check for $10,000.00 that I gave Mr. Allen that day was cashed about six or seven days afterwards. I got no receipt from the Government for that $10,000.00. I made requests upon Mr. Allen for a receipt or evidence that the tax had been settled the day I got the check back from the bank, as quick as I knew the check was back from the bank, and kept repeating the request about once a month for nine months and got the same answer every time. Allen told me that he could not give us a receipt but that we would get one in due time and that the tax was settled and that he had never been turned down in a single case on any compromise that he had ok'd and that I could rest assured that the taxes were all settled. I finally got notice that the offer in compromise was refused, as shown by Exhibit 29, dated February 12, 1924, but did not get my money back until about eight or nine months or maybe a year after I found out they had finally refused it.

I first learned that the Government was claiming that the returns that had been filed in 1917 of the income of the Updike Grain Company for the fiscal period ending June 30, 1917 were not accepted as returns under the October 3, 1917 act about the close of the trial of the Missouri Valley Elevator Company case, or after that, I am not sure whether that came up during that case or not. They admitted we had filed a return and said they were filed and all that, and then after that they came along and said there were no returns at all.

Cross-Examination

By Mr. Blaisdell:

284 Besides the Updike Grain Company witness was in
terested in the Missouri Valley Elevator Company, th
Updike Elevator Company and the Arlington Lumber an
Coal Company.

It was stipulated that the court will take judicial notic
of regulations of the Treasury Department and the Burea
of Internal Revenue, which are put out by the Treasury De
partment in published documents, and that no proof of the
need be made. Thereupon the court announced he woul
also take judicial notice of reports of the committees of Co
gress.

Redirect Examination

By Mr. Ellick:

The witness was asked: "The government proceede
against you in the Updike Elevator case and the Arlingto
Grain Company case under Section 280, before the Board
Tax Appeals." to which the witness answered: "Yes sir.
Witness excused.

Mr. Ellick: The defendants offer in evidence that pa
of Volume 67, No. 43, Congressional Record, 69th Congres
first session, Dated Friday, February 5, 1926, appearing
page 3068 as follows:

"Mr. Reed of Pennsylvania. Now, Mr. President, I a
consideration of the committee amendment at the bottom
page 137.

The Vice-President. The amendment will be stated.

The Chief Clerk. On page 137, after line 23, the Co
mittee on Finance proposed to strike out:

(d) Where the assessment of the tax is made within t
period prescribed in section 277 or in this section, such t
may be collected by distraint or by a proceeding in cou
begun (1) within six years after the assessment of the ta
or (2) at any time prior to the expiration of a
285 period for collection agreed upon in writing by t
commissioner and the taxpayer.

(e) This section shall not effect any assessment mad
or distraint or proceeding in court begun, before the ena
ment of this act, nor shall it authorize the assessment of
tax or the collection thereof by distraint or by a proceedi
in court (1) if at the time of the enactment of this act su
assessment, distraint, or proceeding was barred by the peri

of limitation then in existence, or (2) contrary to the provisions of subdivision (a) of section 274.

And in lieu thereof to insert:

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer.

(e) This section shall not bar a distraint or a proceeding in court begun before the enactment of the revenue act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this act the commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this act.

286 Mr. King: That relates to fraud; does it not?

Mr. Reed of Pennsylvania: Yes.

The Vice President: The question is on agreeing to the amendment.

The amendment was agreed.

Over objection of the complainant the document offered was received in evidence.

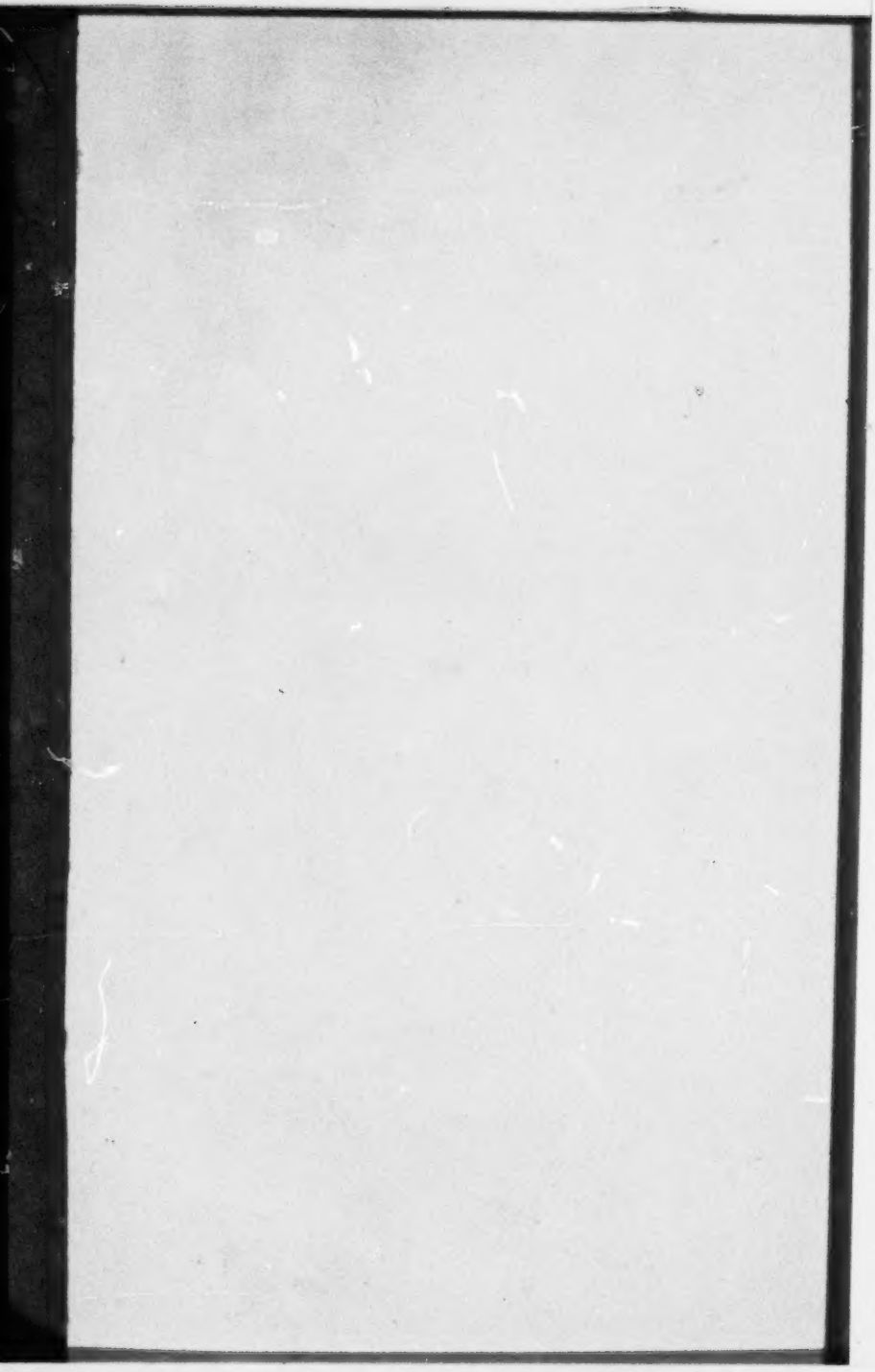
Mr. Ellick: Defendants offer in evidence the petition filed in this court by the United States of America against Nelson B. Updike and others known as in Equity Number 651. Filed April 12, 1924, in the case which we have been terming here as the Missouri Valley Elevator Company case.

Mr. Kinsler: The offer is objected to because it is not relevant to any issue in this case, it is not material and it is not competent, and for the further reason that this petition set up the returns of Missouri Valley Elevator Company under the provisions of the Revenue Act of September 8, 1916, and March 3, 1917 as the returns,—apparently as the

only returns that were required by the Revenue Act of October 3, 1917, and because it was held both in this court and by the Circuit Court of Appeals that so much of the pleadings which is now offered in evidence as set up this return pleaded was absolutely immaterial and because the Circuit Court of Appeals in the former Updike case reported in Volume 8 of the Second Edition of the Federal Reporter at page 913 has expressly held not only that so much of this pleading as set up those returns was absolutely immaterial and should be disregarded but that the evidence offered relating to them,—to this part of the petition should be disregarded.

The Court overruled complainant's objection to the offer, to which complainant at the time duly excepted. The petition was received in evidence, although the trial Judge said
287 "In my opinion this is not admissible. * However, notwithstanding that is my opinion I will overrule the objection".

The Petition, being Exhibit Number 30, is as follows:



IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION.

UNITED STATES OF AMERICA,)

Complainant,)

vs.) In Equity No. 651

NELSON B. UPDIKE, ELMER A. COPE,)
EDWARD UPDIKE, OTIS M. SMITH,)
GORTON ROTH and ROBERT B. UPDIKE,)

Defendants.)

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the United States for the District of Nebraska, Omaha Division.

The complainant by its Attorney, James C. Kinsler, United States Attorney for the District of Nebraska, Omaha Division, complains of the above named defendants and respectfully shows to the court:

I.

That at all times hereinafter mentioned the complainant was, and now is, a corporation sovereign and body politic.

II.

That at all times hereinafter mentioned the defendants, Nelson B. Updike, Elmer A. Cope, Edward Updike, Otis M. Smith, Gorton Roth and Robert B. Updike, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, and resident in, the Omaha Division of said United States District Court in the State of Nebraska within the jurisdiction of this court.

III.

This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for internal revenue and the collection thereof.

IV.

Missouri Valley Elevator Company, hereinafter referred to as the "Corporation" was duly organized as a corporation on or about July 1, 1910, under the laws of the State of Nebraska, with a total paid-up capital stock of $150,000, having its principal office and place of business at the city of Omaha, in the State of Nebraska, and from said July 1, 1910, until on or about August 1 or 2, 1917, which was the date of its formal dissolution, as hereinafter described, said corporation was engaged in the business of receiving grain on consignment, storing, buying and selling and dealing in grain.

V.

The above named defendants were all the stockholders of the said corporation at the date of said dissolution and on and immediately before that date owned and held the following shares of stock of said corporation:

Nelson B. Updike	1,000	shares
Elmer A. Cope	10	"
Edward Updike	256	"
Otis M. Smith	150	"
Gorton Roth	3	"
Robert B. Updike	81	"
Total ...	1,500	shares

VI.

Pursuant to the provisions of the Act of Congress, approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes", hereinafter referred to as the Revenue Act of 1916, and the Act of Congress, approved March 3, 1917, entitled "An Act To provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extension of fortifications, and for other purposes", the said corporation by N. B. Updike, president, and E. A. Cope, treasurer, on or about the 24th day of July, 1917, filed with the Collector of Internal Revenue for the District of Nebraska a

corporation income tax return for ten months of its fiscal year beginning July 31, 1916, and ended May 31, 1917, and on August 29, 1917, they filed an excess profits tax return for the ten months of its said fiscal year, both returns purporting to be true and correct statements of the gains, profits and income from all sources received by and accrued to said corporation during the said ten months of its fiscal year ended May 31, 1917. Said corporation on the 21st day of July, 1917, duly paid to the Collector of Internal Revenue of the District of Nebraska the sum of $3,355.98, the amount of its income tax for said taxable period as shown by its said return, and on August 30, 1917, duly paid to the said Collector the sum of $5,838.52, the amount of its excess profits tax for said taxable period as shown by its said return.

On September 27, 1917, the said corporation by its above named officers filed with the aforesaid Collector of Internal Revenue its amended Excess Profits Tax Return for its said fiscal period from July 31, 1916 to May 31, 1917, showing a total amount of such tax assessable of $5,984.09 and paid an additional sum to said Collector on September 29, 1917, of $145.57, shown to be due by said amended return.

VII.

An Act of Congress entitled "An Act To provide revenue to defray war expenses, and for other purposes", was approved October 3, 1917, and is hereinafter referred to as the Revenue Act of 1917. This Act was H. R. 4280 and was passed by the House of Representatives on May 23, 1917, and on July 3, 1917 was reported to the Senate by the Finance Committee thereof, with such Finance Committee's amendments. Such bill was in part an amendment to the provisions of the said Revenue Act of 1916, in that it increased the normal and surtax rates of the latter Act and increased the War Excess Profits tax rates, provided in the said Act of March 3, 1917, and said Revenue Act of 1917 expressly provided that the rates of the above taxes should relate back to, and be effective from,

January 1, 1917. Said Revenue Act of 1917 expressly repealed Title II of the Revenue Act of March 3, 1917, relating to Excess Profits tax and provided "that any amount heretofore or hereafter paid on account of the tax imposed by such Title II [of Revenue Act of March 3, 1917] shall be credited toward the payment of the tax imposed by this title" [of Revenue Act of 1917].

VIII.

Said returns were incorrect, misleading and false in law in the respects hereinafter set forth.

IX.

Subsequent to the filing of said returns the Commissioner of Internal Revenue upon additional information and facts submitted to him directed a review and audit to be made of the income of said corporation for the said taxable period beginning July 31, 1916 and ending May 31, 1917, and as a result thereof the income, deductions and taxes as theretofore reported by the corporation in its said returns were corrected and redetermined. Said corrections and determinations were made, however, under and by virtue of the provisions of, and rates contained in, the aforesaid Revenue Act of 1917.

X.

Thereafter the Commissioner of Internal Revenue on or about the ____ day of November, 1919, duly assessed against the said corporation an additional tax in the sum of $34,561.92 for the said taxable period beginning July 31, 1916, and ending May 31, 1917; and by reason of the income so received by said corporation as aforesaid during the said taxable period aforesaid, the corporation under the provisions of the said Revenue Act of 1917 amending the aforesaid Revenue Act of 1916, became and now is indebted to the complainant for additional income and excess profits tax in the aforesaid sum of $34,561.92 and the said sum remains yet due and unpaid.

XI.

Complainant is advised and believes, and therefore avers the same to be the facts as set forth in this paragraph, that on August 1, 1917 a meeting of all the stockholders of the above named corporation was had, said stockholders being all the above named defendants to this bill and at said meeting it was unanimously voted that a deed of conveyance of all the real estate and elevator of the said corporation and a bill of sale of all the personal property of the said corporation be properly executed and delivered to Updike Grain Company and that the action of the board of directors [illegible] to dissolution of the corporation be "ratified, confirmed and approved" and that officers of the corporation were authorized and directed to execute the necessary certificate of dissolution and to file the same in the appropriate office. Said certificate of dissolution, after having been duly sworn to by W. F. Updike, president, and [illegible] Smith, secretary, on August 1, 1917, was duly filed in the office of the Secretary of State of the State of Nebraska on August 2, 1917, and was therein duly recorded in said office in Book 32, Miscellaneous Incorporations, at page 8.

XII.

Immediately prior to said dissolution, as the complainant is advised and believes, and therefore avers to be the fact, the said corporation received in cash from Updike Grain Company, a corporation, the sum of $60,000 as the consideration for which by due and legal proceedings it sold, transferred and conveyed to it its elevator and realty. This payment of cash added to its then cash on hand made an aggregate sum of $150,000 as cash assets of the corporation, which last mentioned sum was forthwith and prior to the date of its formal dissolution by it distributed amongst its stockholders, the above named defendants, ratably according to their stock holdings of its shares of stock. By reason of the said dissolution and distribution of all the assets and the property of the said corporation as aforesaid to and amongst its stockholders as hereinbefore set forth, the corporation was left without money, assets or property of any kind

with which to pay the said taxes due and owing to the United States, hereinbefore specifically set out, and the defendants, and each and every of them received as stockholders of said corporation the entire money, assets and property of the said corporation as distributees charged with a trust in favor of the United States to the extent of the said taxes due and unpaid by it as hereinbefore set forth.

XIII.

The complaintant has no clear, adequate or complete remedy at law against either the Missouri Valley Elevator Company or the defendants herein, and, therefore, brings this suit.

XIV.

The Commissioner of Internal Revenue authorizes and sanctions these proceedings.

WHEREFORE, in consideration of the facts herein stated complainant being without a clear, adequate and complete remedy at law, comes before this court and prays:

1. That it be decreed that such part of the corporation's money and assets distributed to defendants on the dissolution aforesaid, as shall be sufficient to pay in full the above described complainant's claim and demand, together with interest thereon at legal rate from the date when said claim against said corporation became legally due and the costs of this suit are by said defendants held in trust to pay the same and that defendants be required to account for the same.

2. That upon such accounting defendants be required to pay to complainant, to the extent that each of them has received the money and assets of said corporation, an amount sufficient to discharge the aforesaid claim and demand of complainant, together with interest thereon at legal rate from the date when said claim and demand became legally due.

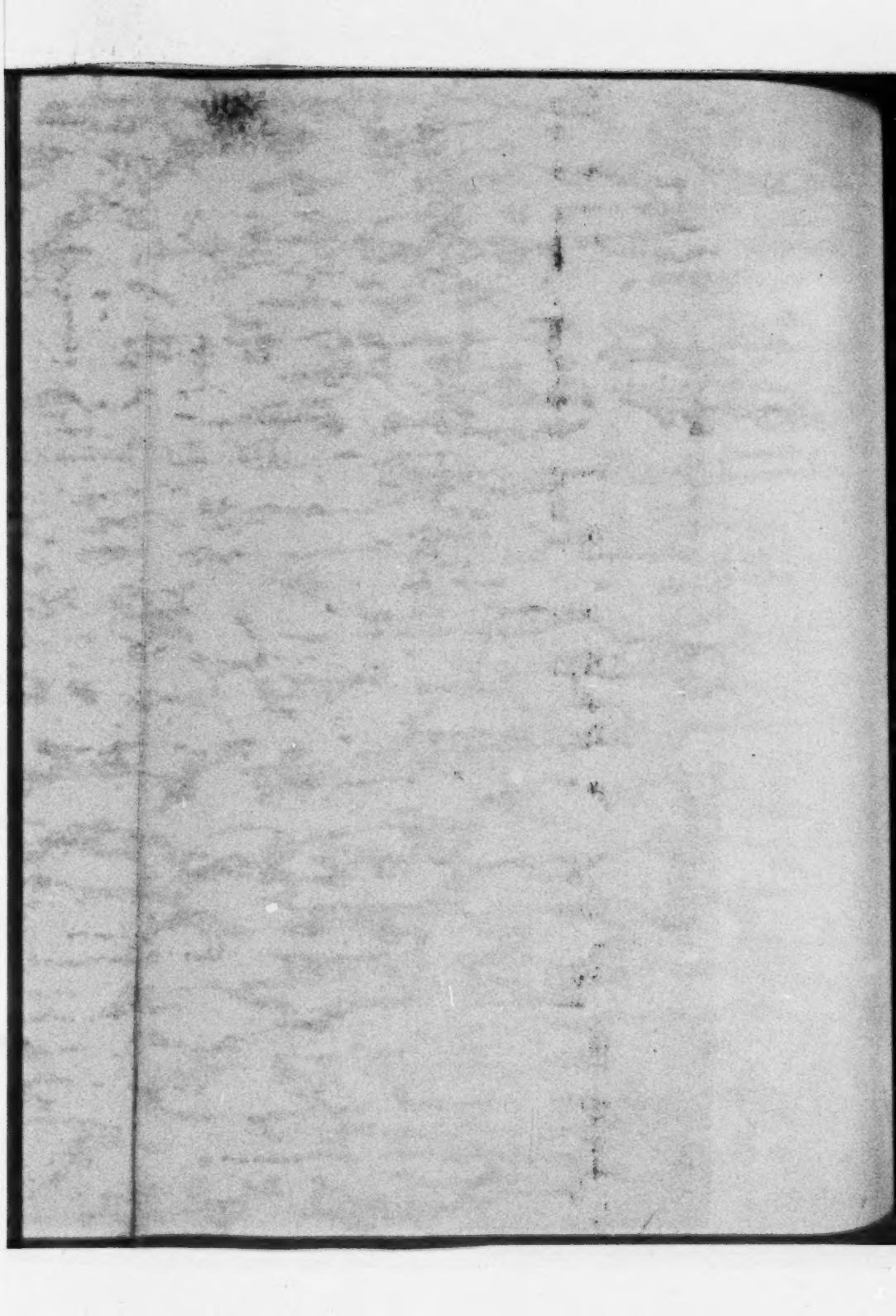
3. That complainant have such other, and further, and general relief as is just and equitable as well as a decree for costs.

And may it please the Court to grant unto the complainant a writ of subpoena to the United States of America issued out of and under the seal of this Honorable Court directed to the above named defendants and commanding them on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court then and there to answer all and singularly the premises, and to stand to and perform and abide by such orders, directions and decrees as may be made against them in the premises, and complainant will ever pray, etc.

James C Kinsler

United States Attorney
District of Nebraska, [redacted].

Attorney for Complainant.



295 Nelson B. Updike being recalled as a witness, testified as follows:

Witness was asked the following question: "Mr. Updike, did you ever give any consent in writing or otherwise or any waiver extending the time within which the Government might proceed against the Updike Grain Company or against you for the collection of this tax?

Complainant objected to the question as immaterial and not within the issues. The Court overruled the objection and complainant was allowed an exception.

The witness answered: "No."

Witness was next asked: "Did you, as an officer of the Updike Grain Company, ever enter into any agreement or consent or sign any waiver with the government extending the time within which the government might proceed against the Updike Grain Company or against any of the stockholders of that corporation for the collection or assessment of this tax?"

Complainant objected to the question as wholly immaterial and not within the issues. The Court overruled the objection and complainant was allowed an exception.

The witness answered: "No."

Witness was next asked: "You have had entire charge of this matter?", to which witness answer "Yes sir." Witness was next asked: "And looked after the interests of the other stockholders who held an interest at that time in the Updike Grain Company?", to which witness answered: "Yes sir". Witness was next asked: "Have you any consents or waivers in writing, or otherwise, been made or entered into or filed by any of the defendants in this case extending the time for the collection or assessment of
296 this tax?", to which question complainant objected as wholly immaterial. The objection was overruled and complainant allowed an exception. The witness answered: "Not that I know of".

Examination

By Mr. Ellick:

I. R. Blaisdell, one of the attorneys for complainant, was called as a witness by defendant, and being duly sworn was examined in chief by Mr. Ellick.

Witness was asked: "Mr. Blaisdell, you have in your possession the entire file of this claim against the Updike Grain Company and the stockholders of the Updike Grain Company?", to which witness answered: "I have the files as far as I know." "The entire file".

Witness was next asked: "Showing all of the proceedings in that matter?", to which witness answered: "Well, I don't know just what you mean. What I have is the correspondence file from the General Counsel's office, merely the file showing letters received and copies of letters, telegrams sent, copies of the pleadings, and I have what I call blank tax reports, administrative file which contains things that have been filed and returns which were all filed under the Act of 1917, returns on No. 1095 filed under the Act of March 3rd and some correspondence between the parties and the Commission." Witness was next asked: "There are copies in these files?", to which witness answered: "As far as I know."

Witness was next asked: "Were there any waivers or consents signed by the Updike Grain Company or any of these defendants extending the time within which the tax claimed in this action could be assessed or collected from the taxpayer?"

The question was objected to as being wholly immaterial and not within the issues.

297 The objection was overruled and complainant allowed an exception.

Witness then answered: "I have never seen any."

Witness has examined the entire file and no such consents or waivers appear in the file.

Cross-Examination

By Mr. Kinsler:

On cross-examination witness was asked: "Did you ever know of anyone signing a waiver where no return had been filed by the taxpayer?", to which witness answered: "No sir". Witness was next asked: "You never heard of that before?", to which witness answered: "No."

Defendants rest.

Government's Rebuttal.

Complainant now offered in evidence all of the interrogatories propounded to D. H. Blair, Commissioner of Internal

Revenue, T. F. Langley, Chief of Proving Section of the Income Tax Unit, Bureau of Internal Revenue, James J. Drakeford, Agent in Charge, Omaha, Nebraska, A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, which had not been offered in evidence by the defendants, and complainant also offered in evidence all of the answers to these interrogatories which had not been offered in evidence by the defendants. Complainant also offered in evidence all of the additional interrogatories propounded to D. H. Blair, Commissioner of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, that were not offered in evidence by the defendants, together with all answers to these additional interrogatories which were not offered in evidence by the defendants.

298 All of the original interrogatories, the additional interrogatories and all answers to the original and additional interrogatories offered in evidence by complainant were received without objection.

Original interrogatory number 19 propounded to Commissioner Blair was as follows: "State if the assessment against the Updike Grain Company of $373,911.54, was entered upon said assessment roll or list in the same manner and in accordance with the same practice that then prevailed, respecting assessments of a like nature against other taxpayers.", to which Commissioner answered: "It was. The assessment of $373,911.54 was made against the Updike Grain Company for its income and excess profits taxes imposed by the Revenue Act of October 3, 1917, as was usual in similar cases. In this case, Updike Grain Company failed to make or file any return under the Revenue Act of October 3, 1917, and no return was made by the Collector, Deputy Collector or Commissioner of Internal Revenue for taxes under said Revenue Act. Updike Grain Company having failed and refused to file a return under the Revenue Act of October 3, 1917, this office caused an investigation to be made of the books, records and papers of Updike Grain Company for the purpose of computing and determining the amount of income and excess profits taxes due from said company under the Act of October 3, 1917. The additional assessment was made upon information furnished by the Revenue Agent."

Original interrogatory number 39 propounded to Commissioner Blairs was as follows: "State from what data, records, information or documents the tax of $373,911.54 assessed

against Updike Grain Company for the fiscal period ending June 30, 1917, was computed, determined and as-
299 sessed." To which the Commissioner answered:

"Upon information furnished by reports of Internal Revenue Agent in charge at Omaha, Nebraska, as heretofore stated, which the agent obtained from the books and records of the Updike Grain Company."

In answer to original interrogatory Number 46, Commissioner Blair answered that he had in his possession or under his control the claim for abatement of the tax of $373,911.54 filed by the Updike Grain Company or the former officers thereof on or about February 19, 1920. And the Commissioner attached a copy of said claim for abatement to his answer, which is as follows:

2-1167-47 733 Jan. 9, 15 L 1

TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE.
Form 47.—Revised April, 1918.
No. 200,000.

CLAIM FOR ABATEMENT

TAXES ERRONEOUSLY OR ILLEGALLY ASSESSED

DATE OF FILING TO BE PLAINLY STAMPED HERE

State of Nebraska,
County of Douglas } ss:

IMPORTANT
This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.

1920 FEB 25 AM 9 25

Write Name as it can be easily read.

Updike Grain Company
(Name of claimant.)

612 Grain Exchange Building, Omaha, Nebraska.
(Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Grain Business
2. Character of assessment or tax Additional tax 1917 income and profits tax
3. Amount of assessment Three Hundred Seventy-three Thousand Nine Hundred Eleven and 54/100 Dollars $373,911.54
4. Amount now asked to be abated Three Hundred Seventy-three Thousand Nine Hundred Eleven and 54/100 Dollars $373,911.54

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

Dissolution of the Updike Grain Company on August 31, 1917 by reason whereof it had no legal existence at the time of the taking effect of the Act of October 3, 1917. There is no provision in that Act for the levying of tax on the share-holders of dissolved corporations upon any other basis than that upon which other individuals are taxed, and the stockholders receiving the assets of the dissolved Company, have made their return and paid taxes on proceeds received by them as the result of such dissolution.

Prior to the dissolution of the corporation in pursuance of Article 85 of the Income Tax Regulations then in full force and effect, as supplemented by Ruling of March 22, 1917, the officers of the corporation retained from its assets, and paid, thereafter, Federal Income Tax and Excess Profits Tax for the fractional part of the year 1917, in pursuance of the final and fiscal returns duly made and filed in accordance with said Rulings.

All of which and additional reasons will more fully appear by the Affidavit of Gorton Roth, former Secretary of the said corporation, hereto attached, and marked Exhibit "A".

Sworn to and subscribed before me this 19th day of February, 1920

Elizabeth LaDoucheur
Notary Public
(Title.)

Signed:

Write Name as it can be easily read.

Gorton Roth

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

373,911.54

CERTIFICATE OF ASSESSMENT

I certify that an examination of the records of the Commissioner's Office shows the following facts as to the assessment and payment of the tax:

NAME AND ADDRESS.	CHARACTER OF ASSESSMENT OR ARTICLE TAXED.	PERIOD COVERED BY ASSESSMENT.	LIST.	YEAR.	MONTH.	PAGE.	LINE.	AMOUNT.
Updike Grain Co	R & A 6/30/1918	11 mos 6/30/17	736	1918	Jan	14	1	373911

LC

E. Norma
Assessment Clerk, Internal Revenue Bureau.

FORM 47

Abatement Order No. .....

District Nebraska

Income
(Nature of tax).

Claimant Updike Grain Co.

Address 625 Omaha Grain Exchange Omaha Neb

Examined and submitted for action ....., 19....

Claim examined by: LL

Claim approved by: SA

Chief of Division.

Amount claimed, $ 373,911.54

Amount allowed, $ None

Amount rejected, $ 373,911.54

COMMITTEE ON CLAIMS:

E W Balch

J C Rogers

M Watson
MCL

302 The seventh original interrogatory propounded to T. F. Langley was as follows: "After the assessments endorsed upon said return were computed and determined, state what course or routine said matter took in the Bureau of Internal Revenue, from the time said assessments were computed and determined up to and including the time of the endorsement of said assessments upon said return." To which the witness answered: "No assessment was endorsed upon said return. Upon the determination of the additional tax by the corporation audit division as above stated, the aforesaid return, together with a summary sheet showing the additional assessments to be made, was sent to the Proving Section of the Income Tax Unit, where the additional assessment list and the Commissioner's certificate were prepared. Said additional tax appeared upon the January, 1920 additional income tax list, page 14, line 1. Said list was signed by J. H. Callan, Acting Commissioner of Internal Revenue, under date of January 27, 1920. Thereafter a further notation was made upon said return indicating that said assessment had been made on the said January, 1920 list, page 14, line 1."

The witness was then asked, as appears by original interrogatory number 8: "Was the computation, determination and assessment of the taxes endorsed upon said return handled or made in the same manner as other income, war income and excess profits taxes assessed against other corporations, under like circumstances?" To which the witness answered: "The aforesaid assessment was not endorsed upon said return. The computation, determination and assessment of said tax was made according to the customary procedure prevailing in the Income Tax Unit."

A. B. Allen, Collector of Internal Revenue, answered additional interrogatory Number 9 as follows: "Orig-
303 inal form 53 forwarded to James R. Peat for transmittal to the Commissioner of Internal Revenue. This form is not prepared in duplicate. Therefore no copy of the form referred to above is on file in this office. Copies of correspondence by mail and telegraph regarding this matter hereto attached", and are as follows:

POSTAL TELEGRAPH – COMMERCIAL CABLES

CLARENCE H MACKAY, PRESIDENT

RECEIVED AT

Signal after the number of words—"Blue" indicates (Day Letter) "N.L." (Night Letter) or "Nite" (Night Telegram)

TELEGRAMS TO ALL AMERICA

CABLEGRAMS TO ALL THE WORLD

DELIVERY NO.

STANDARD TIME INDICATED ON THIS MESSAGE

Form 16

CHB233 65 GOVT 1 EXTRA

1927 FEB 4 PM 1 58

11

K WASHINGTON DC 4

COLLECTOR OF INTERNAL REVENUE

OMAHA NEB

REFERENCE ASSESSMENT THREE HUNDRED SEVENTY THREE THOUSAND NINE HUNDRED ELEVEN DOLLARS FIFTY FOUR CENTS ADDITIONAL INCOME EXCESS PROFITS TAXES AGAINST UPDIKE GRAIN CO FISCAL YEAR ENDED JUNE THIRTY NINETEEN SEVENTEEN APPEARING ON JANUARY NINETEEN TWENTY LIST PAGE FOURTEEN LINE ONE STOP THIS ASSESSMENT MUST NOT BE ABATED ON FORM FIFTY THREE AS SUIT FOR COLLECTION THEREOF IS ABOUT TO BE INSTITUTED AGAINST FORMER STOCKHOLDERS

BLAIR

COMMR.

Form 1206

CLASS OF SERVICE DESIRED	
Telegram	X
Day Letter	
Night Message	
Night Letter	

Patrons should mark an X opposite the class of service desired. OTHERWISE THE MESSAGE WILL BE TRANSMITTED AS A FULL-RATE TELEGRAM

WESTERN UNION TELEGRAM

NEWCOMB CARLTON, PRESIDENT — GEORGE W. E. ATKINS, FIRST VICE-PRESIDENT

Receiver's No.	
Check	
Time Filed	4 P. M.

Send the following message, subject to the terms on back hereof, which are hereby agreed to

Omaha, Nebraska, February 4, 1927.

12

Blair

Commissioner

Washington D C

Reference your wire today in re assessment against Updike Grain Company appearing on January Nineteen Twenty List Page Fourteen Line One stating that assessment must not be abated as suit for collection thereof is about to be instituted Stop Be advised Form Five Three was forwarded to Supervisor James R Peat for transmittal to your office January Seventh Nineteen Twenty-Seven

Allen

Official Business
Government Rate
Collect

Collector

IT:C:CC:1:MS?

RECEIVED
FEB 14 1927
DIST. OF NEBR.

Collector of Internal Revenue,

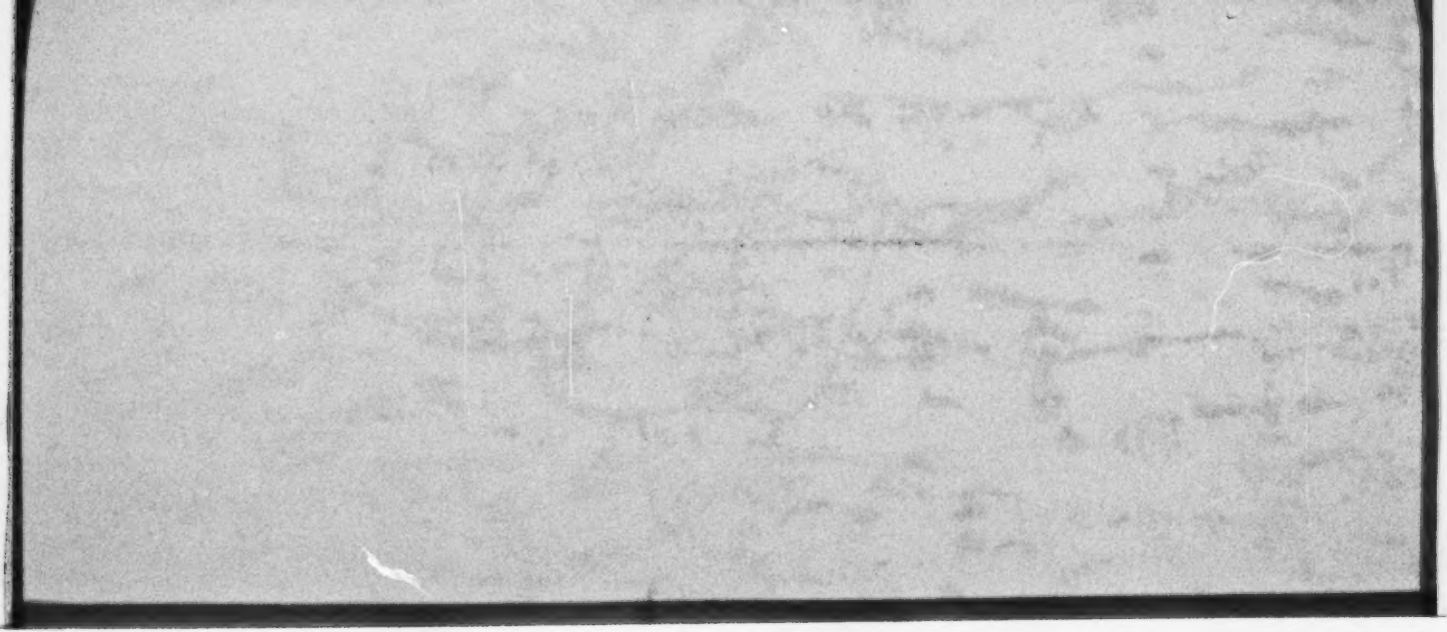
Omaha, Nebraska.

Reference is made to Form 53 submitted by you against the Updike Grain Co., Omaha, Nebraska, in the amount of $273,911.54 for the year 1917.

In this connection you are advised that this office has been informed by the Office of the General Counsel that a suit for collection is about to be instituted against the former stockholders of the taxpayer company, and in view of this information, the uncollectible claim has been rejected.

D. P. NASH,
Assistant to the Commissioner.

By
Head of Division



307 Letter from C. R. Nash to Collector of Internal Revenue Omaha dated December 31, 1926 [if] hereinbefore set forth.

Mr. Ellick: We wish to call the attention of the court at this time to the motions to dismiss complainant's suit filed by the defendants on February 29, 1928 and March 3, 1928, the hearing upon which was postponed by Judge Woodrough, until the trial of this case.

Whereupon the court after arguments and consideration of said motions and the evidence in support thereof, overruled each of said motions. To each of which rulings the defendants severally excepted.

It was agreed between the parties that the offering of proof by the defendants in support of the allegations in paragraphs 7 and 18 of the answer of Nelson B. Updike and the other defendants filed herein, and paragraphs 2 and 3 of the prayer in said answer may be deferred on account of the voluminous character thereof until it has been determined, if ever, that a liability exists upon behalf of the defendants or any of them for the taxes set forth in the amended bill of complaint of the complainant, and that the deferring of such proof shall not in any way prejudice the right of said defendants to offer said proof at any subsequent hearing of this cause before any final judgment shall have been entered herein against any of said defendants.

Complainant rests.

Defendants rest.

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308 Stipulation.

It is agreed between the parties to the above entitled action that the foregoing "Statement of the Evidence" contains all of the evidence offered and received on the trial of the above entitled action, together with all objections thereto, all rulings of the Court on said objections, and all exceptions allowed by the Court to said rulings. And that the foregoing "Statement of the Evidence" correctly shows the proceedings had on said trial, and is correct in all respects, and that it may be signed, settled, allowed and approved by the Court or by said presiding judge thereof, and that it may thereupon be filed in the office of the Clerk of said Court and

become part of the record for the purposes of the appeal of this action.

Dated at Omaha, Nebraska, this 16th day of May, 1928.

JAMES C. KINSLER,
Attorney for Complainant.

BROGAN, ELLICK & RAYMOND,
Attorneys for all above named Defendants except Ed P. Smith and George A. Roberts.

ED P. SMITH,
Attorney for Himself.

WARREN HOWARD,
Attorney for George A. Roberts.

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309 Certificate of Court or Presiding Judge to Statement of the Evidence.

I hereby certify that the foregoing "Statement of the Evidence" contains all of the evidence given or offered on the trial of said cause of the United States of America, Complainant, against Nelson B. Updike and others, Defendants, Number 853 Equity, in the United States District Court, District of Nebraska, Omaha Division, and correctly shows the proceedings on said trial, together with all objections to the evidence offered, all rulings on said objections, and all exceptions allowed to said rulings, and that said "Statement of the Evidence" is correct in all respects and is hereby settled, allowed and approved and made a part of the record on appeal herein.

Dated this 17 day of May, 1928.

By the Court:

THOS. C. MUNGER,
District Judge.

Statement of Evidence Lodged with Clerk, at Omaha, on May 1, 1928. R. C. Hoyt, Clerk. John Nicholson, Deputy.

Endorsed: Filed May 19, 1928. R. C. Hoyt, Clerk.

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310 Praecipe for Transcript of Record.

The Clerk of said United States District Court for the District of Nebraska, Omaha Division, is requested to prepare and transmit to the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, a Transcript of the Record in the above entitled action and include therein the following, namely:

1. Amended Bill of Complaint.

2. Amendment to Paragraph XIX of Amended Bill of Complaint.

3. Answer of Defendant Ed P. Smith.

4. Answer of Defendant George A. Roberts.

5. Answer of Nelson B. Updike and other defendants.

6. Motion of defendants to Dismiss Complainant's suit, filed March 3, 1928.

7. Order of July 9, 1927, granting defendants leave to propound interrogatories to D. H. Blair, Commissioner of Internal Revenue and others.

8. Order of December 21, 1927, granting defendants leave to propound additional interrogatories to David H.
311 Blair, Commissioner of Internal Revenue and others.

9. Trial proceedings commencing March 26, 1928.

10. Memorandum Opinion of Trial Judge.

11. Final order, judgment or decree dismissing plaintiff's suit filed April 13, 1928.

12. State of Evidence.

13. Assignment of Errors.

14. Notice of Appeal of May 1, 1928 and proof of service.

15. Petition for allowance of appeal.

16. Order of May 2, 1928, modifying and re-entering final decree of April 13 1928.

17. Order of May 2, 1928, granting plaintiff leave to refile Petition for allowance of appeal and Assignment of Errors.

18. Order allowing appeal.

19. Citation with proof of service.

20. Notice of appeal of May 2, 1928, with proof of service.

21. Notice of lodgment of Statement of Evidence with proof of service.

22. Praecipe for Transcript of Record and Clerk's Certificate of Transcript of Record.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff.

District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May, 1928, I received this Praecipe for Transcript of Record, and on the 2nd day of May, 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.

By J. A. Davis,
Deputy United States Marshal.

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312 District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May, 1928, I received this Praecipe for Transcript of Record, and on the 3rd day of May 1928, I served the same upon the within-named defendant Ed. P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

District of Nebraska—ss.

I hereby certify and return that on the 2nd day of May, 1928, I received this Praecipe for Transcript of Record, and

on the second day of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Praecipe for Transcript of Record with the exception of the defendants, Ed. P. Smith and George A. Roberts, by delivering a certified copy of said Praecipe for Transcript of Record to Francis A. Brogan, Senior Member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

Endorsed: Filed Mar. 3, 1928, R. C. Hoyt, Clerk.

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313 Praecipe for Additional Portions to Transcript of Record.

The Clerk of said United States District Court for the District of Nebraska, Omaha Division, is requested to incorporate into the transcript on appeal requested by complainant and appellant herein the following:

1. Motion of the defendants to dismiss the above entitled action, filed February 29, 1928.

2. Order of March 10, 1928, continuing hearing on motions of defendants to dismiss to the time of the trial.

3. Application of defendants for leave to file additional interrogatories and affidavit of A. G. Ellick, in support thereof, filed December 21, 1927.

F. A. BROGAN,
A. G. ELLICK,
ANAN RAYMOND,
ED. P. SMITH,
WARREN HOWARD,
Solicitors for Defendants and Appellees.

Service of foregoing praecipe accepted James C. Kinsler U. S. Atty.

Endorsed: Filed May 11, 1928. R. C. Hoyt, Clerk.

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314 (Clerk's Certificate to Transcript.)

United States District Court, District of Nebraska, Omaha Division.

United States of America,
District of Nebraska,
Omaha Division—ss.

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to and in compliance with the Praecipes, copies of which are found on pages 310 and 313 hereof, the foregoing record has been made. That the same are true and faithful Transcript of the pleadings and proceedings on file and of record in said Court, as mentioned in said praecipes and as indicated in the foregoing index, in the case of United State of America, vs. Nelson B. Updike, et al., Case No. 853 Equity, Omaha Division, and that copies of the Notices of Appeal and Citations, duly certified, have been lodged and remain in my office as such clerk.

Witness my hand and the seal of said Court at Omaha in said District this 22 day of June, A. D., 1928.

Seal
U. S. Dist. Court
Dist. of Nebr.
Omaha Div.

R. C. HOYT, Clerk.
John Nicholson,
Chief Deputy.

Filed Jun. 23, 1928, E. E. Koch, Clerk.

391–392 [Appearances of counsel omitted in printing.]

393–394 [Minute entry of argument and submission, Dec. 19, 1928, omitted in printing.]

395 In United States Circuit Court of Appeals
Eighth Circuit

No. 8241, January term, A. D. 1929

UNITED STATES OF AMERICA, APPELLANT

vs.

NELSON B. UPDIKE ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Nebraska

No. 8244, January term, A. D. 1929

NELSON B. UPDIKE ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Nebraska

396 Before KENYON, Circuit Judge, and JOHNSON and MCDERMOTT, District Judges

Opinion

Filed Mar. 21, 1929

MCDERMOTT, District Judge, delivered the opinion of the court.

This action was filed April 28, 1927, to impress a trust upon certain assets of the Updike Grain Company on account of taxes owing the Government, and to require the defendants to account for such taxes up to the value of the corporate assets received by them. The taxes in question are excess-profits taxes under the law of October 3, 1917, are for the taxable period ending June 30, 1917, and amount to $373,911.54. The corporation discontinued business June 30, 1917, and was formally dissolved August 27, 1927. Assets far in excess of the tax claimed were distributed to the stockholders, defendants herein; that is, Nelson Updike took over the property and accounted to the other stockholders for their share in cash. In January, 1920, an assessment was made against the corporation for this tax. The principal question involved is whether this action is barred by the statute of limitations.

Before considering the applicable statutes it must first be determined whether or not this is a "no-return" case. It is conceded that the corporation made no return under the October 3, 1917, act, that no officer of the corporation signed or swore to any return, and that, when requested to make a return the former secretary declined because the corporation was out of existence, had no property, and owed no debts. It appears, however, that on July 25, 1917, the corporation filed an income-tax return, and on August 30, 1917, filed an excess-profits tax return, both for the period in question and both disclosing its invested capital, its indebtedness, and its net income. These returns were on the forms then provided and disclosed the tax due under the statutes then in force. On September 28, 1917, an amended excess-profits tax return was filed. These taxes were paid. A different tax was levied by the act of October 3, 1917, and different forms of return prescribed, which the
397 corporation declined to make. Art. 61, Reg. 33, expressly provides for a particular form of return in case of a corporation dissolved prior to October 3, 1917. Congress has power to prescribe forms for returns. (Updike v. U. S., 8 F. (2d) 913 (8 C. C. A.).) After the corporation declined to make a return under the October, 1917, law, the Government agents audited the books and incorporated the result of such an audit on a return blank, which was not signed or sworn to but which was made the basis of the assessment. Although the evidence is not entirely clear, we are of the opinion that the tax due under the October, 1917, law could not have been accurately computed from the information given by the returns filed by the company under the earlier statutes. It is clear, however, that the Government auditors secured from the books all the information necessary to make the assessment which was made under the October, 1917, law. In fact, the Government vouches for the completeness of this information by suing on it.

It is largely a legal question of whether this is a no-return case. When the statutes of limitation refer to a "failure to file a return," do they mean a return "signed by the taxpayer"? If they do, this is a no-return case. On the other hand, if they mean to exclude from the limitations statute those cases in which the Government is not aware of any tax liability on account of a failure to file a return, then this is not a no-return case, for the Government had more and better information from the audit than it could get from a return.

This particular question has been ruled by this court in the case of Updike v. U. S. (8F. (2d) 913). In that case another of the Updike companies dissolved during the summer of 1917 and declined to make a return on the forms prescribed by the commissioner for the collection of taxes under the October, 1917, law, and for the same reason as that given here. In that case, too, the corporation had made returns under the earlier laws before dissolution. The brief for appellees states:

"Returns had been filed for that company in the same manner as they had been filed for the Updike Grain Company."

There, as here, the Government made its own audit. It is said in argument that the record in that case does not disclose the extent of the audit made and that the record in this case does. That
398 is not material. The court in the cited case was advised of the earlier returns, the refusal to make a return after dissolution under the new law, and that the "Revenue Department thereupon made a computation" of the tax due. The case is therefore controlling. We quote excerpts from the opinion:

"To this we can not agree. Returns under the acts of 1916 and March 3, 1917, obviously could not cover the increased taxes imposed by the later act. For the ascertainment of the latter a return would be logical and essential, and its requirement accords with the procedure established by Congress in all revenue laws of this nature.

"(2) The sections of the act above quoted clearly call for such returns, and it was within the power of Congress to authorize the Commissioner of Internal Revenue to prescribe the formal administrative features of time and form in the making of such returns. The provision that 'any amount heretofore paid on account of the tax imposed by such title 2 shall be credited toward the payment of the tax imposed by this title' does not negative the requirement of a return under the act of October 3, 1917, nor make such a return supplemental to those previously furnished. It might very well be that no previous return had been made by one subject to tax under prior acts. In such case a return must be made under the act of October 3, 1917, and not under those prior acts. This provision was inserted for the protection of the taxpayer against double taxation for the same period and has to do with payments made, not with the returns from which such payments were computed.

"(3) In this case a return was required, and none made, in a true legal sense. Therefore the limitation invoked has no application."

This decision is not only controlling, but, in our judgment, is right. This company discovered no obstacle in the way of making an amended return, under the old law, on September 28, 1917, after dissolution and no difficulty in finding officers to file claims for abatement of earlier taxes after that date. It could have made one under the October law. It knew the Government had power to make a tax retroactive. As a matter of fact, the bill passed in October was well along in preparation in July. Certainly a corporation can not formally dissolve, decline to pay a tax that its neigh-
399 bors pay, claim an inability to make a return, and then seek protection behind a statute of limitations that expressly excludes cases where no return is filed. It is argued that the 1921 law uses the phrase "required return," while the later statutes simply say "return." This change was to do away with quibbling as to the correctness of the return or whether the return or amended return governed and can not alter the decision in the first Updike case above referred to. It is therefore a no-return case.

This brings us to the main contention, the statutes of limitations. We may well start with the proposition that lapse of time does not destroy the Government's right to collect a tax unless some statute says so. While this is a case against transferees, we must consider that it is a proceeding in court to collect a tax, notwithstanding that it is an action against transferees. Since the argument herein the case of Russell v. U. S. has been decided by the Supreme Court of the United States (No. 58, Jan. 2, 1929). That was an action in equity against the stockholders of a dissolved corporation "to impress the assets received by them with a trust and to recover the amount of taxes assessed against the corporation." (Id. 22 Fed. (2d) 249.) That is this action. The Supreme Court held such action was "a proceeding for the collection of taxes" and was barred.

We turn now to the statutes of limitation in the various acts, bearing in mind that these statutes are not retrospective unless expressly so. (U. S. v. Magnolia Pet. Co., 276 U. S. 160; Russell v. U. S., supra.)

The 1918 statute (c. 18, 40 Stat. 1057, 1083, sec. 250 (d)) does not bar the claim, for the limitations therein apply only to the taxes levied by that act. The 1921 law (sec. 250 (d), rev. act, 1921) does not bar the claim because the limitations therein contained start "after the return was filed." The 1924 law (sec. 278 (d), rev. act, 1924) for the first time starts the statute with the assessment, except for suits without assessment. This section is similar to section 278 (d) of the 1926 law. It has been expressly held, however, that section 278 of the 1924 act has no "possible application to cases where assessment had been made prior to June 2, 1924." (Russell v. U. S., supra.) There is left, then, the 1926 law.

400 The 1926 law (sec. 278 (d)) provides:

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer."

Three other amendments were made in 1926, in paragraphs 2, 3, and 4 of the preceding section (277), which are of significance. Prior to the 1926 amendments these paragraphs provided that "and no proceeding in court for the collection of such taxes shall be begun" after the period fixed in each paragraph for assessment. That is, prior to 1926, the period for assessment or court action were the same; the Government had to assess or sue, or assess and sue, within the particular period, say five years.

But in 1926 in all three paragraphs the limitation on proceedings in court was qualified by inserting the words "without assessment,"

so that the paragraphs now read "and no proceeding in court without assessment for the collection of such taxes shall be begun," etc.

Take these amendments in connection with 278 (d) quoted above, and the idea of Congress is clear and inescapable. Congress fixed one period (say five years) for the initial move against the taxpayer, whether it be by assessment or suit without assessment, and a different period (6 years) for the second move, distraint or court proceedings, after assessment. For the second move we look to 278 (d) and that alone.

Now there was an assessment here, made in January, 1920. So 278 (d), laws of 1926, governs and nothing else. Let us then see whether this section bars this action.

(1) "Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress * * *." It is expressly retroactive and covers taxes imposed by the 1917 law, thereby differing from sec. 278 (d) of the 1924 act.

401 (2) "has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto * * *." The assessment was made in this case in 1920. It is vigorously urged that in a no-return case there is no period of limitation for assessment, and therefore this section does not apply. But the argument does not persuade. The intent in the words "within the statutory period of limitation applicable thereto" is too plain for mistake. This section authorizes the Government to sue after a proper assessment; the Board of Tax Appeals had been created, and Congress wanted to extend the time for suit for a reasonable period after assessment, so that appeals to the board could be prosecuted, etc. But Congress didn't want to give that right to sue if the assessment was barred by the statute when it was made. Therefore Congress qualified the right to sue by providing that the assessment must have been made in time. The assessment here was made in time, and that phrase has served its purpose.

(3) "such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act) * * *." It was argued that this is an equitable proceeding to impress a trust upon certain assets and is not a "proceeding in court" to collect a tax, as contemplated by this section. But since the argument the Supreme Court, in the Russell case, supra, has held that an identical case was barred by an identical statute.

(4) "but only if begun (1) within six years after the assessment of the tax." The tax was assessed in 1920 and the suit brought in 1927.

This section covers this case, and this action is barred.

It is argued that throughout all the statutes Congress has expressly provided that in case of a false or fraudulent return, or in case of a failure to file a return, the tax may be assessed, or a "proceeding in court for the collection of such tax may be begun without

assessment at any time"; that therefore such a limitation should be read into 278 (d). It is probably true that the Government could now maintain this suit if the assessment had not been made in 1920, and probably true that if the assessment had never been made it could now be made. If it is true, it is unfortunate. But it still remains true that this is not a suit "without assessment" and is therefore not within the savings clause. It is still true that Con-
402 gress did not expect from 278 (d) cases where an assessment was made without return. There may have been good reasons why Congress did not want the Government to have unlimited time to bring a suit after the department knew the amount of tax due and assessed it; but whether that be true or no, Congress, and not the courts, must be asked to amend the statutes. If it should be suggested that the six years provided in the 1926 law had elapsed when the 1926 statute was passed, and that it is unfair to bar a claim of the Government without notice, it may be answered again that it was for Congress to enact a savings clause if one were desired. The power of Congress to enact a statute barring suit by the Government without a savings clause as to claims thereby automatically barred has not been challenged, either here or in the court below, and need not be considered.

We conclude that this action is barrd by the statute. Questions argued in the cross-appeal need not be discussed except to say that the provisions of section 280 (Laws of 1926), providing for assessment against transferees, are cumulative and do not bar this suit. Over and beyond distraint and statutory proceedings in court there exists the plenary powers of courts of equity. Updike v. U. S., 8 F. (2d) 913 (8 C. C. A.); U. S. v. Armstrong, 26 F. (2d) 227, (8 C. C. A.) Such remedies are cumulative, and the existence of a statutory remedy does not bar this suit. (Dollar Savings Bank v. U. S., 86 U. S. 227; sec. 1122 (b), rev. act, 1926.) Section 280, enacted first in 1926, limits the period for assesment against transferees but does not limit court proceedings against them. Since 280 was enacted by the same Congress as enacted new section 278 (d), it fortifies our conclusion and that of the Supreme Court in the Russell case, to wit, that 278 (d) applies to transferees. Congress was legislating on the subject and covered limitations on assessments (but not suits) against tranferees in 280, and covered suits (but not assessments) against transferees in 278 (d). No assessment has been made againt the transferees herein, as suggested by counsel for appellees; but we need not consider here any question of the limitation of time for such assessment under 280 or the limitation of a proceeding in court after such assessment.

403 The decrees of the court below are affirmed on both appeals.

404 In United States Circuit Court of Appeals,
Eighth Circuit

No. 8241

UNITED STATES OF AMERICA, APPELLANT

vs.

NELSON B. UPDIKE, METTA E. UPDIKE, N. B. UPDIKE, Jr., HAZEL Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Charles Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Joseph P. McGrath, Ed P. Smith, and George A. Roberts

Appeal from the District Court of the United States for the District of Nebraska

And No. 8244

NELSON B. UPDIKE, METTA E. UPDIKE, N. B. UPDIKE, Jr., HAZEL Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnefred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Charles Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Joseph P. McGrath, Ed P. Smith, and George A. Roberts, appellants

vs.

UNITED STATES OF AMERICA

405 Mar. 25, 1929

Appeal from the District Court of the United States for the District of Nebraska

Decree

These causes came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska and were argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in these causes be, and the same is hereby, affirmed, without costs to either party in this court.

In United States Circuit Court of Appeals

Number 8241

[Title omitted.]

Petition for rehearing

Filed May 16, 1929

The appellant and petitioner, United States of America, respectfully petitions this court to grant a rehearing of appellant's above-entitled appeal and to reconsider its opinion and decision filed in the office of the clerk of this court March 21, 1929, for the following reasons, namely:

406

1. In its said opinion and decision this court misconstrued the meaning of section 277 (a) (3) of the revenue act of 1926.

2. In its said opinion and decision this court misconstrued the meaning of section 278 (d) of the revenue act of 1926.

3. In its said opinion and decision this court misconstrued the meaning of section 277 (a) (2) of the revenue act of 1924.

4. In its said opinion and decision this court erroneously held the limitation provisions of the revenue act of 1926 to be applicable to what this court, as appears at page 5 [399] of its opinion, had already held to be "a no-return case."

5. In its said opinion and decision, as appears at page 5 [399] of the opinion, this court misconstrued and misapplied the decision of the Supreme Court of the United States in Russell v. United States (73 L. Ed. 162).

Wherefore petitioner prays that a rehearing of this appeal be granted.

GEORGE A. KEYSER,
Assistant United States Attorney,
AMBROSE C. EPPERSON,
Assistant United States Attorney,
JAMES C. KINSLER,
United States Attorney,
Attorneys for Appellant and Petitioner.

MAY 15, 1929.

CERTIFICATE OF COUNSEL

The undersigned attorney and counsel for appellant and petitioner, United States of America, hereby certifies that the within and foregoing petition for rehearing is presented in good faith and not for delay.

JAMES C. KINSLER,
United States Attorney.

[File endorsement omitted.]

407 In United States Circuit Court of Appeals

Order denying petition for rehearing

May 29, 1929

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellant.

On consideration whereof it is now here ordered by this court that said petition for a rehearing of this cause be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Motion for stay of mandate

Filed June 3, 1929

To the honorable the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

The petition of the appellant, United States of America, by James C. Kinsler, United States attorney for the District of Nebraska, acting by authority of the Attorney General of the United States, respectfully represents:

1. That on March 21, 1929, an opinion of this court was filed herein affirming the judgment of the United States District Court for the District of Nebraska, Omaha division, in favor of Nelson B. Updike and others in an action in which the United States of America, as plaintiff, sought to recover from said Nelson B. Updike and others, former stockholders of Updike Grain Company, a corporation, and transferees of the assets of said corporation during the year 1917, the sum of $373,911.54, together with interest and costs, said principal amount being the amount of war-income and excess-profits taxes imposed on said corporation by the revenue act of October 3, 1917, and which said corporation refused and neglected to pay.

408 Said Updike Grain Company, the corporate taxpayer, at all times refused and neglected to file the return or returns for its war-income and excess-profits taxes, as required by said revenue act of October 3, 1917, and by the regulations of the Treasury Department of the United States.

Said action of the United States of America against said Nelson B. Updike and others, transferees of the assets of said Updike Grain Company, was commenced April 28, 1927, and the trial court held that the prosecution of said action was barred by the provisions of section 278 (d) of the revenue act of 1926. And this court, in its said opinion filed herein March 21, 1929, after holding this to be "a no-return case," affirmed said judgment of the trial court and held that the prosecution of appellant's said action against said Nelson B.

Updike and others was barred by the provisions of said section 278 (d) of the revenue act of 1926.

Within sixty days from said March 21, 1929, namely, May 16, 1929, said appellant filed herein its petition for rehearing of said decision and opinion of this court, together with brief in support of said petition for rehearing. And said petition for rehearing was overruled by this court May 29, 1929.

2. The question presented by appellant's assignments of error is whether the prosecution of said action of the appellant, the United States of America, against said Nelson B. Updike and others, transferees of the assets of said Updike Grain Company, is barred by said section 278 (d) of the revenue act of 1926 or by any of the limitation provisions of the revenue acts of 1921, 1924, or 1926.

3. The petitioner, by advice of the Attorney General of the United States, desires that the Supreme Court of the United States be
409 asked to pass upon the questions involved herein with a view of procuring a reversal of this court's said opinion and decision and to have finally determined the question whether appellant's said action against said Nelson B. Updike and others, transferees of the corporate assets of said Updike Grain Company, is barred by the statute of limitations, namely, by said section 278 (d) of the revenue act of 1926, or by any of the limitation provisions of the revenue acts of 1921, 1924, or 1926.

4. The acts of Congress and t rules of the Supreme Court of the United States in such cases made and provided fix the time within which petitions for writs of certiorari may be filed in the Supreme Court of the United States at three months from the date of final decision sought to be reversed, in this case three months after May 29, 1929. It is further provided by rule 35 of said Supreme Court of the United States that the party making application for the writ of certiorari shall serve on counsel for respondents, within ten days after the filing thereof, a copy of the petition and the printed record and supporting brief, and the act of Congress in such cases made and provided allows at least three months in which to file said petition for the writ of certiorari.

5. This petitioner is prepared to perfect the record in this case and to file its petition for the writ of certiorari in the Supreme Court of the United States on or before the 28th day of June, 1929.

6. This petitioner is advised that in order that the proceedings herein may remain in their present status, pending the disposition of such petition for the writ of certiorari, a special order of this court is required to stay the issuing of the mandate of this court pending the time necessary, as above set forth, for the presentation of said petition for the writ of certiorari to the Supreme Court of the United States.

410 7. As the Government of the United States of America is the petitioner herein, it should not be required, and by law is not required, to give bond requiring the faithful prosecution of

said petition for the writ of certiorari or for damages incident to a refusal thereof.

Wherefore your petitioner prays that this honorable court enter an order herein directing the clerk of this court to withhold the mandate in this cause pending the filing of petitioner's petition for the writ of certiorari in the Supreme Court of the United States until June 28, 1929, and that if said petition shall have been filed in said Supreme Court of the United States on or before that date said mandate of this court be further withheld until said Supreme Court of the United States shall act upon said petition for the writ of certiorari and that this petitioner be not required to give bond for the faithful prosecution thereof.

Dated at Omaha, Nebraska, June 1, 1929.

UNITED STATES OF AMERICA,
Appellant and Petitioner,
By JAMES C. KINSLER,
United States Attorney,
and AMBROSE C. EPPERSON,
Assistant United States Attorney.

[File endorsement omitted.]

411 In United States Circuit Court of Appeals

Order staying issuance of mandate

June 3, 1929

On consideration of the motion of appellant for a stay of the mandate in this cause until June 28, 1929, pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this court that the said motion be, and it is hereby, granted, and if there is filed with the clerk of this court on or before that date a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof, by affidavit, of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

412 [Clerk's certificate to foregoing transcript omitted in printing.]

413 In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

July 22, 1929

On consideration of the supplemental petition for additional stay of mandate pending petition of appellant to the Supreme Court

of the United States for a writ of certiorari, it is now here ordered by this court that the issuance of the mandate in this cause be, and is hereby, further stayed until August 26, 1929, and if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record, and brief have been filed and proof, by affidavit, of notice thereof under paragraph 3 of rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 22, 1929.

414 [Certificate to foregoing paper omitted in printing.]

415 Supreme Court of the United States

Order allowing certiorari

Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below, which accompanied the petition, shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34471. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 340. The United States of America, petitioner, vs. Nelson B. Updike et al. Filed August 23, 1929. File No. 34471.

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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

NELSON B. UPDIKE ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on March 25, 1929 (rehearing denied May 29, 1929), affirming the decree of the United States District Court for the District of Nebraska.

STATEMENT

The Updike Grain Company, a Nebraska corporation, dissolved and distributed its assets to stockholders without the payment of income and excess-

profits taxes due the United States. Accordingly, the Government instituted this suit in equity, under the trust fund theory, against the former stockholders of that company to recover funds had and received by them for the use and benefit of the United States. The principal defense interposed was that such suit, although one for the recovery of trust funds, was barred by the provisions of the Revenue Act of 1926, limiting the time within which the Government might institute proceedings for the collection of taxes. This defense was upheld by both the United States District Court for the District of Nebraska and the United States Circuit Court of Appeals for the Eighth Circuit.

It is the contention of the petitioner that statutes of limitation relating to proceedings to collect taxes do not apply to a suit in equity under the trust fund doctrine. In the alternative, the petitioner contends that even if such statutes do apply, there is none which bars this suit, for the reason that the required returns were not filed and in the absence of such returns no statute of limitations was set in motion.

The essential facts relative to the above issues are:

The Updike Grain Company was dissolved during the month of August, 1917, and its assets, greatly exceeding its known liabilities, were distributed to its stockholders. (R. 10, 29, 123, 127.) Prior to the passage of the Revenue Act of October 3, 1917, hereinafter referred to as the Revenue Act of

1917, the corporation filed income tax and excess-profits tax returns for the eleven-months period ended June 30, 1917, these returns being prepared under the provisions of the Revenue Acts of September 8, 1916, and March 3, 1917. (R. 163–171.) An amended excess-profits tax return, likewise prepared under the earlier statutes, was filed October 27, 1927. (R. 175.)

On October 3, 1917, the Revenue Act of 1917 was passed, and shortly thereafter the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued regulations (Article 61, Regulations 33, and Article 10, Regulations 41) providing that corporations which had dissolved in 1917 prior to the passage of the Act should make income and excess-profits tax returns in accordance with the provisions of the Revenue Act of 1917, for the period preceding dissolution, and that the taxes previously paid for such period would be credited against the amount due.

The former officers of the Updike Grain Company were aware of these requirements, but declined to file returns under the Revenue Act of 1917. (R. 87–95, 148.)

During October, 1918, the Commissioner had a revenue agent investigate the tax liability of the Updike Grain Company, as the result of which investigation additional taxes of $373,911.54 were assessed in January, 1920. (R. 95, 212–213.) In connection with this investigation the revenue agent prepared returns. The evidence is in dispute as to

whether these forms were presented to former officers of the company for verification but not as to the fact that they were never signed or verified by the officers. (R. 96, 115, 121, 349, 350.)

No part of the assessment of $373,911.54 has been paid. No suit or proceeding to collect the amount has been instituted against the dissolved corporation, nor was any suit or proceeding instituted against the stockholders until the present action was begun in 1927.

On April 13, 1928, the District Court entered a decree dismissing the bill at the plaintiff's costs and on May 2, 1928, entered a decree modifying its previous decree only as to costs. (R. 69.)

The trial court held that the revenue agent's report was a return, the filing of which served to set in motion the five-year period of limitations upon the assessment of taxes due under the Revenue Act of 1917; that the assessment made in January, 1920, was made within the statutory period of limitations properly applicable thereto within the meaning of Section 278 (d) of the Revenue Act of 1926; and that under that section this suit against the respondents for the recovery of trust funds was barred because not commenced within six years after the assessment in January, 1920. (R. 65-69.)

Upon appeal the Circuit Court of Appeals sustained the decision of the District Court, holding that the suit was barred by the statute of limitations. Contrary to the District Court, however, the Circuit Court of Appeals conceded that this was a

"no return" case. It based its decision largely on the ground that in enacting Section 278 (d) of the Revenue Act of 1926, Congress intended that the Government's right to collect taxes should be limited to six years from the time of assessment, even where no returns were filed. (R. 396.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In holding that Section 278 (d) of the Revenue Act of 1926, limiting the time within which the petitioner might institute a proceeding to collect income and excess-profits taxes imposed upon the Updike Grain Company by the Revenue Act of 1917, was applicable to and constituted a bar to this suit in equity brought against the respondents as stockholders of the dissolved corporation under the trust fund theory.

II. In holding that, where no returns for the fiscal period ending June 30, 1917, were filed by the corporation as required by the provisions of the Revenue Act of 1917 and the regulations of the Treasury Department, any proceeding of the Commissioner to collect taxes imposed by that Act would be barred within six years from the time the assessment was made by the provisions of Section 278 (d), *supra*.

REASONS FOR GRANTING THE WRIT

I. This case raises a question which has not heretofore been decided by this Court, namely, whether

a provision in a Revenue Act limiting the time within which the United States may begin a proceeding for the collection of taxes, applies to a suit in equity brought by the United States under the trust-fund theory against the stockholders of a dissolved corporate taxpayer, the assets of which had been distributed to such stockholders without the payment of corporation income and excess-profits taxes due the United States. *Russell* v. *United States,* 278 U. S. 181, can not be said to have decided this question, because, while it existed in the record in that case, it was not raised nor considered either in the lower courts or in this Court. *United States* v. *Mitchell,* 271 U. S. 9, 14. The question is one which should be authoritatively decided by this Court. It will arise often because, in view of the attack on the constitutionality of Section 280 of the Revenue Act of 1926, the general jurisdiction of equity has been frequently used against transferees of corporate assets and, however the question of the constitutionality of Section 280 may ultimately be resolved, it will probably continue to be used, since it provides in many cases a more convenient remedy.

II. It is our contention that the above question is controlled in principle by the decision of this Court in *United States* v. *John Barth Co.,* 279 U. S. 370. There this Court held that a statute of limitations applicable to a suit to collect taxes does not apply to a suit to recover on a bond given in connection with a claim in abatement. In that case, as

in this, the liability asserted grew out of a claim for taxes. The only difference between the two cases is that in the *Barth case* the cause of action arose under a contract, whereas here it arises by operation of law. That a liability of the latter sort is not barred by the provisions of a Revenue Act limiting the time for a suit to collect taxes was held in *Talcott* v. *United States*, 23 F. (2d) 897, 901, certiorari denied, 277 U. S. 604, in which the Government's claim was for the amount of taxes refunded to a taxpayer by mistake.

III. Even if it were conceded that a statute limiting the period of collection of taxes is applicable to a suit to enforce an equitable liability, the conclusion of the Circuit Court of Appeals, that the instant suit is barred, is not required by the provisions of Section 278 (d) of the Revenue Act of 1926. The case, therefore, falls within the principle that the United States is not bound by limitations unless Congress has by clear language made it so. The purpose of Congress in enacting Section 278 (d) of the Revenue Act of 1926 was, as indicated by this Court in the *Russell case, supra*, with reference to the corresponding section of the Revenue Act of 1924, to extend rather than to curtail the rights of the Government. Yet the Circuit Court of Appeals in the instant case has construed this section in a manner which bars retroactively a right of the United States which, but for its passage, could have been enforced.

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IV. If an assessment, which the statute provides can be made at any time where no return is filed, as in the instant case, be regarded as it was by the Circuit Court of Appeals as being made within a statutory period of limitations so that the six-year period for collection applies, then the same rule would govern in cases where false and fraudulent returns were filed. In both classes of cases the statute provides the assessment can be made "at any time."

Wherefore, it is respectfully submitted that the petition should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

AUGUST, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 393) is reported in 32 F. (2d) 1. The opinion of the United States District Court for the District of Nebraska (R. 65–69) is reported in 25 F. (2d) 746.

JURISDICTION

The decree of the Circuit Court of Appeals for the Eighth Circuit was entered on March 25, 1929. (R. 398.) A timely petition for rehearing filed in behalf of the petitioner on May 16, 1929 (R. 399), was denied on May 29, 1929 (R. 400). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 278 (d) of the Revenue Act of 1926, or any other statutory provision limiting the time within which a proceeding may be brought by the United States for the collection of taxes imposed under the Revenue Act of 1917, have any application to a suit in equity brought under the trust fund theory against the stockholders of a dissolved corporate taxpayer for money had and received to the use and benefit of the United States?

2. Even if it be held that a statute of limitations relating to proceedings to collect taxes imposed by the Revenue Act of 1917 applies to this suit in equity, does Section 278 (d) of the Revenue Act of 1926 constitute a bar to the proceeding, in view of the fact that the required returns were not filed and in the absence of such returns the assessment could be made, in the language of that Revenue Act, "at any time"?

STATUTES AND REGULATIONS INVOLVED

Section 13 (b) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 771, which is incorporated in the Revenue Act of 1917 by Section 1001 (c. 63, 40 Stat. 300, 325) of that Act, provides:

> SEC. 13. (b) Every corporation, * * * subject to the tax herein imposed, shall * * * render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office

of the corporation, * * * where are kept its books of account and other data from which the return is prepared, * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part as follows:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 * * * and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed * * *; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *: *Provided further,* That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, provides in part as follows:

> SEC. 277. (a) * * *.
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917 * * * shall be

assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (U. S. C., Title 26, Sec. 1058.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59, 61, provides in part as follows:

SEC. 2. (a) When used in this Act—

* * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act.

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without

assessment, at any time. (U. S. C. App., Title 26, Sec. 1058.)

* * * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and

the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act. (U. S. C. App., Title 26, Sec. 1069.)

Article 61, Treasury Regulations 33, Revised:

ART. 61. *Corporation dissolved prior to October 4, 1917.*—A corporation which was dissolved in 1917, prior to passage of the war-revenue act of October 3, 1917, is subject to tax under the act of September 8, 1916, as amended, and also to the war income tax and the war excess-profits tax imposed by the act of October 3, 1917. (*Brady et al.* v. *Anderson,* 240 Fed. 665.) A corporation so situated will make a return on revised form 1031, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have paid any excess-profits tax under the act of March 3, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess-profits tax assessable against it under Title II of the act of October 3, 1917.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

I

NEITHER SECTION 278 (D) OF THE REVENUE ACT OF 1926 NOR ANY STATUTE PLACING A PERIOD OF LIMITATIONS UPON THE RIGHT OF THE UNITED STATES TO COLLECT TAXES IMPOSED UNDER THE REVENUE ACT OF 1917 IS APPLICABLE TO THIS SUIT IN EQUITY TO RECOVER TRUST FUNDS FROM THE TRANSFEREES OF THE ASSETS OF THE UPDIKE GRAIN COMPANY

It is submitted that the Circuit Court of Appeals erred in holding that Section 278 (d) of the Revenue Act of 1926, a statute of limitations relating to proceedings for the collection of taxes, applied to suits in equity brought to recover trust funds, and in relying upon *Russell* v. *United States,* 278 U. S. 181, as authority to that effect.

The *Russell case, supra,* can not be said to have decided the question whether the statute of limitations relating to the collection of taxes applies to a suit against the transferees of the assets of a dissolved corporation. That question was, it is true, involved in the record in the *Russell case,* but it was not raised or considered either in this Court or in the courts below. In these circumstances this Court can not be said to have authoritatively decided it.

In *United States* v. *Mitchell,* 271 U. S. 9, 14, this Court said:

> It is not to be thought that a question not raised by counsel or discussed in the opinion

> of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall*, 266 U. S. 507, 511.

See also *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *New* v. *Oklahoma*, 195 U. S. 252.

Upon the face of the statute it does not appear that Congress intended Section 278 (d) to apply to suits in equity to recover trust funds. That section expressly relates to proceedings to collect *taxes*. This is not such a proceeding. The language of the section refers to the collection of taxes *qua* taxes from the persons on whom the liability therefor is directly imposed by the taxing statutes as distinguished from third persons, such as the respondents here involved, whose liability to the United States is created not by the taxing statutes but by general principles of equity. This is further borne out by an examination of other sections of the statute. Section 277 (a) (3) of the Revenue Act of 1926 provides that (subject to the exception contained in Section 278) the amount of taxes imposed by the Revenue Act of 1917 (the year involved herein) "shall be assessed within five years *after the return was filed*, and no proceeding in court without assessment for the *collection of such taxes* shall be begun after the expiration of such period." (Italics ours.) Section 278 (d) further provides that—

> Where the assessment of any * * * tax imposed by * * * prior Act of Con-

> gress has been made * * * within the statutory period properly applicable thereto, such *tax* may be collected by distraint or by a proceeding in court * * * but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the *taxpayer*. (Italics ours.)

Finally, the term "taxpayer" is defined in Section 2 (a) (9) of the Revenue Act of 1926 as "any person subject to a tax imposed by this," that is, the Revenue Act.

The use of the expression "such tax may be collected" in Section 278 (d), and the reference to the agreement in writing between the "Commissioner and the taxpayer," indicates that such limitation provision should apply only to those persons upon whom the tax liability was imposed by the taxing statutes themselves, that is, the "taxpayer." There can be no *tax* due the United States from any person who is not a taxpayer as defined by Section 2 (a) (9), *supra*.

Moreover, in enacting Section 280 of the Revenue Act of 1926, which prescribes a procedure whereby a notice of deficiency in tax may be sent directly to the transferee of the assets of the taxpayer, and the transferee in such case is given the right of appeal to the United States Board of Tax Appeals, Congress deemed it necessary to make specific provision for the running of the statute of limitations in the case of transferees. If, in the absence of specific

provision, the general statutes of limitation of the Revenue Act of 1926 would not apply to proceedings against transferees under Section 280, it would seem that they would likewise not apply to suits in equity brought, in the language of the Circuit Court of Appeals in the instant case, "under the plenary powers of courts of equity."

That Congress has persisted in regarding the liability of transferees as distinct from the liability of taxpayers is further shown by its enactment of Section 604 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 873; U. S. C. Sup. III, Title 26, Sec. 2604) prohibiting suits to restrain the enforcement of the liability of transferees under Section 280 of the Revenue Act of 1926 as amended. If a proceeding to enforce such a liability constitutes a proceeding to collect taxes, Section 3224, R. S. (U. S. C., Title 26, Sec. 154), would effectively prohibit a suit to restrain such proceeding, and Section 604 would serve no useful purpose. Cf. *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 F. (2d) 798; *Felland* v. *Wilkinson* (*unreported*, W. D. Wisc., decided November 22, 1928).

An obligation resting upon a person to pay the United States an amount of money, not because he had a net taxable income and was a taxpayer under the Revenue Acts, but because in some way a different liability, albeit growing out of a tax, has been created with respect to him, is not a tax liability. The liability of the transferees in this case did not come into being by reason of the imposition of the tax against the Updike Grain Company but

by reason of their receiving assets of the corporation (upon its dissolution) prior to the satisfaction of its tax liability. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, certiorari denied, 271 U. S. 661; *United States* v. *Armstrong* (C. C. A. 8th), 26 F. (2d) 227.

The term "corporation" does not include stockholders, and a statute imposing a liability upon the corporation does not impose a liability upon the stockholders. *Park Bank* v. *Remsen,* 158 U. S. 337, 346. It is settled that stockholders' liability for corporate indebtedness is a distinct liability which does not come into being until the corporate assets have been transferred to the stockholders. See *Terry* v. *Anderson,* 95 U. S. 628; *Terry* v. *McLure,* 103 U. S. 442; *Scovill* v. *Thayer,* 105 U. S. 143; *McClaine* v. *Rankin,* 197 U. S. 155; *McDonald* v. *Thompson,* 184 U. S. 71; *George* v. *Wallace* (C. C. A. 8th), 135 Fed. 286; *McWilliams* v. *Excelsior Coal Company* (C. C. A. 8th), 298 Fed. 884. The liability to pay taxes in this case, therefore, was a liability against the corporate taxpayer as distinguished from the stockholders. In this situation, if this were a suit to enforce a liability for taxes *qua* taxes owing by the corporation, to assert it against the stockholders would amount to an endeavor to take one person's property to pay another's taxes in violation of the due process clause of the Constitution. Cf. *Frick* v. *Lewellyn,* 298 Fed. 803.

Accordingly, the Government contends that the correct solution of the question presented in the

instant case is to be found in those cases which hold that where two remedies exist, even though one remedy may be barred, the other remedy is unaffected. An example of this doctrine is afforded by the cases holding that a statute limiting the time for a suit to annul land patents has no application to a suit to recover the value of such lands as damages for their fraudulent acquisition. *United States* v. *Whited & Wheless,* 246 U. S. 552. This Court has applied the same principle to an action brought to recover money paid by mistake. *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112. In *Talcott* v. *United States* (C. C. A. 9th), 23 F. (2d) 897, certiorari denied 277 U. S. 604, the Government interposed a counterclaim for the recovery from the plaintiff of a sum which had been refunded by mistake of the Commissioner. The plaintiff contended that the counterclaim was barred by the limitations contained in the Revenue Act of 1926. The court held that "here the counterclaim is not a proceeding for the collection of taxes," and accordingly that it was not barred. This same principle has recently been applied by this Court in *United States* v. *John Barth Co.,* 279 U. S. 370, wherein it was held that a suit brought by the United States upon a bond given to secure the payment of taxes is not barred by the statute of limitations within which a suit must be brought for the collection of taxes.

In analogy to the *Barth case* the Government here contends that its right to sue the stockholders of a

dissolved corporation for money had and received for the use and benefit of the United States is not dependent upon, but exists independently of, and in addition to, any right which the Government might have had to sue the corporate taxpayer for the collection of taxes *qua* taxes, and that consequently the statute of limitations relating to the collection of taxes does not apply to such a suit.

It is true that in the *Barth case, supra,* the independent remedy was founded upon a written contract; whereas in this case it was founded upon an equitable liability, but that fact does not furnish adequate ground for distinguishing the cases. (See *Talcott* v. *United States, supra.*) In both cases a separate and distinct cause of action exists. It is our contention that if the statute of limitations relating to the collection of taxes does not apply in the one case, it should not apply in the other.

II

EVEN THOUGH IT SHOULD BE CONCEDED THAT THE DEFENSE OF A STATUTE OF LIMITATIONS RELATING TO THE COLLECTION OF TAXES WAS AVAILABLE TO THE RESPONDENTS, SUCH DEFENSE MUST FAIL FOR THE REASON THAT THE RETURNS REQUIRED BY LAW HAVE NOT BEEN FILED, WITHOUT WHICH NO STATUTE OF LIMITATIONS HAS BEEN SET IN MOTION

The Circuit Court of Appeals found that this was a case where returns were required to be filed and none were filed, as it had under similar facts in *Updike* v. *United States,* 8 F. (2) 913, certiorari denied, 271 U. S. 661. In the latter case that court held that the required returns not having been filed

by the corporate taxpayer, the assessment of income and excess-profits taxes imposed under the Revenue Act of 1917 could be made "at any time" and a proceeding to collect the tax could be brought "at any time" by virtue of the express provisions of Section 250 (d) of the Revenue Act of 1921. It was held, therefore, that no statute barred the suit against the stockholders.

In the instant case, instead of holding that the Government had an unlimited time within which to institute proceedings to collect, as it had in the first *Updike case,* the Circuit Court of Appeals held that the Government's right to do so expired in January, 1926, six years from the date of the assessment. It distinguished the instant case on the ground that here the proceeding against the stockholders was begun after the passage of the Revenue Act of 1926, Section 278 (d) of which places a limit of six years after assessment upon the Government's right to institute proceedings to collect a tax in all cases where the assessment was made "within the statutory period of limitation properly applicable thereto."

The Circuit Court of Appeals did not find that there was any specific limitation of time within which the Government was required to assess the tax and it could not have reached such a conclusion. The Revenue Acts of 1917 and 1918 do not contain any statute of limitations applicable to assessment of taxes imposed by the Revenue Act of 1917. The

Revenue Acts of 1921, 1924, and 1926 need not be consulted for the purpose of determining whether an assessment made in 1920 was made "within the statutory period of limitation properly applicable thereto" within the meaning of Section 278 (d) of the Revenue Act of 1926. Assuming that they may be, however, the only period of limitation for assessment of taxes imposed under the Revenue Act of 1917 which is recognized by these Acts is a period of five years "after the return was filed" (Section 250 (d), Revenue Act of 1921; Section 277 (a) (2), Revenue Act of 1924; Section 277 (a) (3), Revenue Act of 1926), and where no return has been filed, the assessment may be made at any time (Section 250 (d) of the Revenue Act of 1921; Section 278 (a) of the Revenue Act of 1924; Section 278 (a) of the Revenue Act of 1926).

It is submitted that with respect to a tax which may be assessed at any time, as is the case where the required returns have not been filed, there is no period of limitations applicable, and hence that this case does not come within the provision of Section 278 (d) of the Revenue Act of 1926 limiting the period for collection to six years where an assessment has been made "within the statutory period of limitation properly applicable thereto."

The Circuit Court of Appeals has based its decision largely on the ground that through the insertion of the words "without assessment" after the words "no proceeding in court" in Section 277 (a) of the Revenue Act of 1926, thus amending the

corresponding provision of the Revenue Act of 1924, and by the enactment of Section 278 (d), Congress showed an intention to fix one period (for example, 5 years) for the initial move against the taxpayer, whether by assessment or suit without assessment, and a different period (for example, 6 years) for the second move, namely, for distraint or court proceeding after assessment. But it was plainly the intention of Congress to lengthen and not to shorten the arm of the Government thereby. Compare *Russell* v. *United States, supra.* Instead of construing the Act so as to accomplish this purpose, the Circuit Court of Appeals held in effect that Section 278 (d) of the Revenue Act of 1926 barred absolutely the right of the Government to bring a proceeding to collect an obligation which under statutes existing prior to the time of the passage of that Act could have been collected "at any time." It is established that a statute, particularly a statute of limitations, should not be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions, unless the legislative purpose to do so clearly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160; *Russell* v. *United States, supra.* That rule controls this case.

If it be granted that Section 278 (a) of the Revenue Act of 1926 does not, as did the earlier statutes, specifically provide that where no return has been filed a proceeding to collect the tax *after assessment* may be brought "at any time," the con-

clusion is inescapable that there is no statutory limitation provided as to such actions and hence that they may be brought at any time. In the absence of a statute of limitations which clearly applies, the United States is not bound. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456; *United States* v. *St. Paul, M. & M. Ry. Co.,* 247 U. S. 310.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals was erroneous, and, in view of the general importance of the questions decided, that the petition for writ of certiorari should be granted.

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Special Assistants to the Attorney General.
AUGUST, 1929.

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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, PETITIONER

v.

NELSON B. UPDIKE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska (R. 65–69) is reported in 25 F. (2d) 746. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 391) is reported in 32 F. (2d) 1.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 25, 1929. (R. 397.) A timely petition for rehearing filed in behalf of the petitioner on May 16, 1929 (R. 398), was denied on May 29,

1929 (R. 399). Petition for certiorari was filed August 23, 1929. Certiorari was granted October 21, 1929. (R. 402.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does Section 278 (d) of the Revenue Act of 1926, or any other statutory provision limiting the time within which a proceeding may be brought by the United States for the collection of taxes imposed under the Revenue Act of 1917, have any application to a suit in equity brought under the "trust fund theory" against the stockholders of a dissolved corporate taxpayer for money received to the use and benefit of the United States?

2. Even if it be held that a statute of limitations relating to proceedings to collect taxes imposed by the Revenue Act of 1917 applies to this suit in equity, does Section 278 (d) of the Revenue Act of 1926 constitute a bar to the proceeding, in view of the fact that the required returns were not filed and in the absence of such returns the assessment could be made, in the language of that Revenue Act, "at any time"?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations will be found in an appendix to this brief.

STATEMENT OF FACTS

The Updike Grain Company, a corporation organized under the laws of the State of Nebraska, was dissolved during the month of August, 1917, and its assets were distributed to its stockholders ratably so that each stockholder received in cash or its equivalent at least $100 for each share of stock owned. (R. 9, 10, 12, 17, 29, 115, 127.) The paid-up capital stock of the corporation at the time of its dissolution was $2,000,000. (R. 5, 12, 17, 22.)

Prior to the passage of the Revenue Act of October 3, 1917, hereinafter referred to as the Revenue Act of 1917, the corporation filed income-tax and excess-profits tax returns for the eleven-month period ended June 30, 1917, these returns being rendered in accordance with the provisions of the Revenue Acts of September 8, 1916, and March 3, 1917. (R. 163–171.) An amended excess-profits tax return for the same period was filed September 28, 1917, this return likewise being prepared in accordance with the provisions of the earlier statutes. (R. 175.)

On October 3, 1917, the Revenue Act of 1917 was passed and shortly thereafter the Commissioner of Internal Revenue issued a regulation, Article 61 of Regulations 33 Revised (see Appendix), providing that corporations which had dissolved in 1917 prior to the passage of that Act should file income and excess-profits tax returns in accordance with the provisions of the Revenue Act of 1917 for the

period preceding dissolution, and that the taxes previously paid for such period would be credited against the amount due on such returns.

A blank return form revised under the Revenue Act of 1917 was mailed to the corporation and was returned to the collector's office without being filled in or signed, together with a letter from Gorton Roth, former secretary of the Updike Grain Company, stating that the corporation had filed income and excess-profits tax returns prior to its dissolution, that it had been dissolved and had distributed its assets and that he was aware of the provisions of Article 61 of Regulations 33, but was advised that it was erroneous. (R. 87–95.) No returns were ever filed by or in behalf of the corporation under the Revenue Act of 1917. (R. 147–148.)

During October, 1918, the Commissioner had a revenue agent investigate the tax liability of the Updike Grain Company. As the result of his report additional income and excess-profits taxes in the sum of $373,911.54 were assessed for the eleven-months period ended June 30, 1917. (R. 8–9, 14–15, 18–19, 23, 95–97, 143–147, 212–213.) The assessment in question was made on the January, 1920, assessment list. (R. 212–213.)

In connection with this investigation the revenue agent prepared returns. (R. 96.) The evidence is in dispute as to whether these returns were presented to former officers of the company for verification but not as to the fact that they were never

signed or verified by the officers. (R. 96, 115, 121, 349, 350.)

Notice and demand for payment of the tax in question was mailed to the Updike Grain Company on February 10, 1920. (R. 299.) No part of the amount has been paid. (R. 147.) No suit or proceeding to collect the amount has been instituted against the dissolved corporation nor was any suit or proceeding instituted against its former stockholders until the present suit in equity was begun against them in 1927 under the "trust fund" doctrine to recover funds received by them to the use of the United States through their receipt of assets of the corporation prior to its payment of income and excess-profits taxes due for the period ended June 30, 1917.

The principal defense interposed was that the action, although a suit to recover "trust funds," was barred by provisions of the Revenue Act of 1926 limiting the time within which the Government might institute proceedings for the collection of taxes. This defense was sustained by the trial court which held that the revenue agent's report was a return, the filing of which served to set in motion the five-year period of limitations upon the assessment of taxes due under the Revenue Act of 1917; that the assessment made in January, 1920, was made "within the statutory period of limitation" properly applicable thereto within the meaning of Section 278 (d) of the Revenue Act of 1926,

and that under that section this suit against the respondents to recover "trust funds" was barred because not commenced within six years after the assessment in January, 1920. (R. 65–69.)

On April 13, 1928, the District Court entered its decree dismissing the bill at the plaintiff's costs and on May 2, 1928, entered a decree which modified its previous decree only as to costs. (R. 69.) Thereupon by petition for appeal allowed May 2, 1928 (R. 76), the petitioner brought the case to the Circuit Court of Appeals for the Eighth Circuit. That court affirmed the decision of the trial court, holding that the suit was barred under Section 278 (d) although it conceded that the case was a "no return" case. It based its decision chiefly on the ground that in enacting Section 278 (d) of the Revenue Act of 1926, Congress intended that the Government's right to collect taxes by suit should be limited to six years from the time of the assessment, even where no returns were filed and the assessment could be made "at any time." (R. 394–396.) This Court granted certiorari on October 21, 1929.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In holding that Section 278 (d) of the Revenue Act of 1926, limiting the time within which the petitioner might institute a proceeding to collect income and excess-profits taxes imposed upon the Updike Grain Company by the Revenue Act of

1917, was applicable to and constituted a bar to this suit in equity brought against the respondents as stockholders of the dissolved corporation under the "trust fund theory."

II. In holding that, where no returns for the fiscal period ending June 30, 1917, were filed by the corporation as required by the provisions of the Revenue Act of 1917 and the regulations of the Treasury Department, any proceeding of the Commissioner to collect taxes imposed by that Act would be barred within six years from the time the assessment was made by the provisions of Section 278 (d), *supra*.

SUMMARY OF ARGUMENT

I. Section 278 (d) of the Revenue Act of 1926 limiting the time after assessment within which the Government may institute proceedings to collect taxes imposed under the Revenue Act of 1917 and other Revenue Acts expressly relates only to proceedings to collect taxes *qua* taxes and not to suits in equity to recover "trust funds." That Congress intended Section 278 (d) of the Revenue Act of 1926 to be so restricted is indicated by the fact that in Section 280, authorizing the Commissioner to notify transferees of corporate assets of deficiencies in tax against the corporation and giving them the right of appeal to the Board of Tax Appeals, specific statutes of limitation were enacted. If the general statutes of limitation in the Revenue Act of 1926 do not apply to proceedings under Section 280, they should

not apply to this proceeding which was not brought under the Revenue Act but was instituted under general equitable principles.

Nor can the applicability of Section 278 be maintained on the theory that the stockholders and the corporation are identical for taxation purposes, for that is not the rule.

The question is whether, notwithstanding the fact that Section 278 (d) of the Revenue Act of 1926 does not in express terms relate to this proceeding, it is nevertheless controlled by the same statute of limitations as would apply to a suit against the corporate taxpayer to recover the tax. *Russell* v. *United States,* 278 U. S. 181, is not authority on this issue for the question was not raised or decided in that case although it existed in the record.

The case is controlled in principle by *United States* v. *John Barth Co.,* 279 U. S. 370, and other decisions recognizing that where two independent remedies exist, the barring of one remedy does not bar the other.

In the instant case the cause of action against the stockholders of the Updike Grain Company was an independent cause of action which accrued only when the corporation dissolved and distributed its assets to its stockholders without paying taxes due the United States. The only statute of limitations which would apply to such action would be one enacted with specific reference to this independent cause of action and none has been cited.

II. Even if it be conceded that the same statute of limitations is applicable to a suit against the stockholders as would have applied to a suit against the corporation, the present proceeding is not barred. Section 278 (d) of the Revenue Act of 1926 does not limit the Government's right to collect the tax to a period of six years after the assessment except in cases where the assessment has been made "within the statutory period of limitation properly applicable thereto." The five-year period of limitation upon the assessment of taxes imposed under the Revenue Act of 1917 is limited to cases where a bona fide return has been filed by the taxpayer. Where the required return has not been filed the assessment can be made "at any time." The Circuit Court of Appeals conceded that this was a "no return" case. Hence, the assessment which was actually made in January, 1920, could have been made "at any time."

An assessment which can be made at any time does not come within the operation of Section 278 (d), and there is no statute of limitations as to the collection of such an assessment. It was the purpose of Congress in enacting Section 278 (d) to lengthen and not to shorten the period of limitations. To construe the Act as it has been construed by the Circuit Court of Appeals in this case would have the opposite effect and would bar retroactively the right of the Government to institute a suit which except for the passage of the Act

could have been brought at any time. Such a construction is contrary to the rule that a statute should not be construed to change the status of existing claims unless the legislative intent to do so is clear, and also to the rule that the United States is not bound by a limitation provision unless the intent that it shall be is clear.

ARGUMENT

I

NEITHER SECTION 278 (D) OF THE REVENUE ACT OF 1926 NOR ANY STATUTE PLACING A PERIOD OF LIMITATION UPON THE RIGHT OF THE UNITED STATES TO COLLECT TAXES IMPOSED UNDER THE REVENUE ACT OF 1917 IS APPLICABLE TO THIS SUIT IN EQUITY TO RECOVER TRUST FUNDS FROM THE FORMER STOCKHOLDERS OF THE UPDIKE GRAIN COMPANY AS TRANSFEREES OF ITS ASSETS

The courts below have held that the present suit in equity against the former stockholders of the Updike Grain Company is barred by Section 278 (d) of the Revenue Act of 1926 because not instituted within six years after income and excess profits taxes were assessed against the corporation.

The Government contends that neither Section 278 (d) of the Revenue Act of 1926, nor any other statute of limitations relating to proceedings for the collection of taxes, applies to a suit in equity brought to recover "trust funds," and that the Circuit Court of Appeals erred in relying upon *Russell* v. *United States*, 278 U. S. 181, as authority to the contrary.

The *Russell case, supra,* can not be said to have decided the question whether the statute of limitations relating to proceedings for the collection of taxes applies to a suit against the transferees of the assets of a dissolved corporation. It is true that the question existed in the record in the *Russell case,* but it was not raised or considered either in this Court or in the courts below. In these circumstances this Court can not be said to have decided it.

In *United States* v. *Mitchell,* 271 U. S. 9, 14, this Court said:

> It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered. *Webster* v. *Fall,* 266 U. S. 507, 511.

See also *Louisville Trust Co.* v. *Knott,* 191 U. S. 225; *New* v. *Oklahoma,* 195 U. S. 252.

It is clear that Section 278 (d) of the Revenue Act of 1926 does not in express terms relate to a proceeding in equity against the stockholders of a dissolved corporation. It provides merely that if an assessment of income and profits taxes under that Act or previous Acts meets certain requirements (discussed hereinafter), then "such tax may be collected by distraint or by a proceeding in court," provided it is begun "(1) within six years after the assessment of the tax" or "(2) prior to the

expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

The "proceeding in court" to which this provision relates is a direct proceeding to collect taxes *qua* taxes from those persons upon whom liability has been directly imposed. This is borne out by the use of the expression "such tax may be collected," and by the extension of the six-year period in the case of an agreement between the Commissioner and "the taxpayer." The term "taxpayer" is defined in Section 2 (a) (9), *infra*, p. 43, as any person "subject to a tax imposed by this Act." The taxes here involved were imposed upon the corporation. (R. 8–9.)

That Section 278 (d) of the Revenue Act limiting the time after assessment within which the Government may institute a proceeding to collect a tax refers only to a direct proceeding against the taxpayer finds further support when consideration is given to the provisions of Section 280. That section prescribes a procedure whereby a notice of deficiency in corporation taxes may be sent directly to the transferee of the assets of a corporate taxpayer, the transferee in such case being given the right of appeal to the United States Board of Tax Appeals. It is significant that in enacting this provision Congress did not refer to the transferees as taxpayers or designate their responsibility for the tax as a tax liability, but referred to it as "the liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the

tax * * * imposed upon the taxpayer," thus clearly differentiating taxpayers from transferees.[1]

In enacting Section 280, moreover, Congress, apparently realizing that the previous sections of the law which prescribed limitation periods as to the collection of taxes *qua* taxes would have no application to this new and additional remedy, deemed it necessary to create in that section a separate and distinct period of limitation within which the assessment of the liability of transferees may be made and proceedings for the enforcement of such liability instituted. The taxpayer has not urged that these limitation provisions of Section 280 apply to this proceeding and it is clear that they do not apply where no notice of the deficiency in corporate taxes has been mailed to the transferee and he has not been given an opportunity to appeal to the Board of Tax Appeals.

On the contrary the taxpayer has contended and the courts below have held that the general statutes

[1] The courts below have recognized that in view of the provisions of Section 1122 (b) of the Revenue Act of 1926, *infra*, p. 48, the remedy provided in Section 280 is not exclusive and that the Government has not thereby been deprived of its rights to proceed against the transferees of corporate assets by a suit in equity brought independently of Section 280. The District Court for the District of Massachusetts reached the same conclusion in *United States* v. *Greenfield Tap & Die Corporation*, 27 F. (2d) 933. Section 1318 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1148; Section 1310 (b) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 310; and Section 1025 (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 348, contain provisions which are identical with Section 1122 (b) of the Revenue Act of 1926.

of limitation relating to *taxpayers* govern this proceeding. But if, in the absence of specific provision, the general statutes of limitation in the Revenue Act of 1926 would not be applicable to proceedings against transferees under Section 280, it seems that they would likewise not apply to this suit which has not been brought in accordance with the procedure prescribed under Section 280, or under any other provision of the Revenue Act, but has invoked, to quote the Circuit Court of Appeals, "the plenary powers of courts of equity." (R. 396.)

That Congress has continued to treat the liability of transferees as distinct from the liability of taxpayers is further shown by the enactment of Section 604 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873 (U. S. C. Sup. III, Title 26, Sec. 2604), prohibiting suits to restrain the enforcement of the liability of transferees under Section 280 of the Revenue Act of 1926, as amended. If a proceeding to enforce such a liability constituted a proceeding to collect taxes, then Section 3224 R. S. (U. S. C., Title 26, Sec. 154) would effectively prevent a suit to restrain the proceeding against the transferees and Section 604 would serve no useful purpose. *Cf. Owensboro Ditcher & Grader Co.* v. *Lucas,* 18 F. (2d) 798.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Routzahn* v. *Tyroler* (C. C. A. 6th), 36 F. (2d) 208, may be cited

by the respondent as establishing the principle that "transferees" are "taxpayers" within the meaning of the Revenue Acts. The court there said (p. 209):

> Upon the basis of these same assumptions, plaintiffs-appellees urge that the opportunity to be heard by the transferee ended with the Board of Tax Appeals, and that the absence of any further opportunity for hearing constitutes a lack of due process under the Fifth Amendment. We think this argument fails because, in our judgment, the transferee has the right to have the whole matter heard by the Circuit Court of Appeals in the exercise of its power to review (section 1001, Revenue Act of 1926, section 1224, title 26, USCA); and, where a statute expressly gives a right to judicial review of an administrative order before the order can be enforced, there is no room to invoke the "due process" clause. *Ben Avon Case,* 253 U. S. 287, 289, 40 S. Ct. 527, 64 L. Ed. 908; *State of Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 41, 46, S. Ct. 384, 70 L. Ed. 818. It is true that this right of review is expressly given only to the "tax payer" (section 1224, tit. 26, USCA), and that this term is so defined in the act (see section 1262 (a) (9), tit. 26 USCA), that doubt would naturally exist whether it was intended to include the transferee from whom the tax was being collected; but, even as restricted by this definition, the term "tax payer" is not seriously inaccurate when applied to the involuntary payer of the tax

> debt, and he has before the Board the rights of a taxpayer. See section 602 (913, Revenue Act of 1928 (26 USCA Sec. 1230). True, the contrary inference would follow, from the opinion of the majority of the Board in the *Cappellini Case,* 14 B. T. A. 1269, but we cannot agree that any estoppel arises, as the Board there thought. To say that an act may impose an unconstitutional liability and forbid all judicial review except in one way, and then that one who appeals for review in the way provided for him thereby estops himself to deny the validity of the imposition, is, to our minds, an obvious solecism.

It is believed that this language should not be taken to mean that the court considered that "transferees" were "taxpayers" but only that they were *treated* as taxpayers under Section 280 for the purpose of appellate review of the decision of the Board. That interpretation was adopted to avoid the decision of a constitutional question under the due process clause of the Fifth Amendment. The language quoted above should be read in the light of the fact that the suit was brought to secure an injunction against the enforcement of the liability of transferees and that the court in holding that an injunction would not lie did not rely upon Section 3224 R. S. prohibiting a suit to enjoin the collection of a tax, but relied on the fact that the transferees had an adequate remedy by virtue of the right given them under Section 280 to appeal to the Board of

Tax Appeals and to secure a review of an adverse decision of the Board by the Circuit Court of Appeals.

Nor can the conclusion that the limitation contained in Section 278 (d) should apply to a proceeding in equity against the former stockholders of a dissolved corporation be reached on any theory that the corporation and its stockholders are one. This Court has repeatedly held that a corporation must be regarded for purposes of taxation as an entity separate and distinct from its shareholders, and that a statute imposing a liability upon the corporation does not impose a liability upon stockholders. *Van Allen* v. *The Assessors,* 3 Wall. 573; *Park Bank* v. *Remsen,* 158 U. S. 337; *Eisner* v. *Macomber,* 252 U. S. 189; *Cullinan* v. *Walker,* 262 U. S. 134.

An obligation resting upon an individual to pay the United States a sum of money, not because he had a net taxable income and was a "taxpayer" *subject to tax imposed by a Revenue Act*, but because in some way independently of any revenue law a different liability, albeit growing out of a tax, has attached to him, is not a tax liability. The liability of the stockholders in this case did not arise simultaneously with the imposition of the tax against the Updike Grain Company and would never have arisen if they had not received assets of the corporation (upon its dissolution) prior to the satisfaction of its tax liability. *Updike* v. *United States* (C. C. A. 8th), 8 F. (2d) 913, cer-

tiorari denied, 271 U. S. 661; *United States* v. *Armstrong* (C. C. A. 8th), 26 F. (2d) 227. A suit to enforce a liability for taxes *qua* taxes against the stockholders would amount to an endeavor to take one person's property to pay another's taxes in violation of the due-process clause of the Constitution. *Cf. Frick* v. *Lewellyn,* 298 Fed. 803; affd. 268 U. S. 238.

If it be admitted that the statute does not in express terms relate to a proceeding in equity of this kind, the question is whether, notwithstanding such fact, the proceeding is necessarily controlled by the same statute of limitations as would control a direct suit to collect the tax. As previously stated, that question existed in the record in the *Russell case, supra,* but was not raised or decided there.

The question has also existed but was not raised or considered in a number of other decisions where the Government has proceeded against the stockholders of dissolved corporations who received the assets of such corporations prior to the satisfaction of the corporations' debts for taxes. *Updike* v. *United States, supra; United States* v. *Whyel* (C. C. A. 3rd), 28 F. (2d) 30; *United States* v. *Pann* (S. D. Cal.), 23 F. (2d) 714; *United States* v. *Armstrong, supra.*

In their brief in opposition to the petition for certiorari, respondents have relied upon *United States* v. *Lazenby* (N. D. Texas), 5 F. (2d) 827, and *United States* v. *Snook* (N. D. Ga.), 24 F. (2d) 844, and upon certain rulings of the Bureau of In-

ternal Revenue and decisions of the Board of Tax Appeals as authority on the issue whether a statute of limitations governing proceedings to collect taxes is applicable to a suit in equity such as the suit at bar. As to the Bureau rulings and Board decisions relied upon, it is sufficient to point out that they were all decided with reference to proceedings against transferees under Section 280 of the Revenue Act of 1926 which contained specific provisions as to the limitation periods governing such proceedings and that they are not in point on the issue involved in this suit instituted independently of the Revenue Act. Moreover, the Commissioner has not acquiesced in *Hynes* v. *Commissioner*, 16 B. T. A. 1272, and has carried that case to the Circuit Court of Appeals for the Eighth Circuit.

No decision has been cited by respondents which may be considered as controlling on this issue. The *Lazenby case* was decided before Congress showed through the enactment of Section 280 that it did not consider general statutes of limitation to be applicable to suits against the transferees of corporate assets. The *Snook case* was decided on other grounds by the Circuit Court of Appeals for the Fifth Circuit (*Austin* v. *United States*, 28 F. (2d) 677) and is not entitled to great weight. It is also distinguishable on the facts, for a return was filed in that case and since the statute of limitations had not run against the corporation it was not necessary to decide whether it could have barred a suit against the transferees.

It is the contention of the Government that the correct solution of this question is to be found in those cases which hold that where two remedies exist, even though one be barred, the other is unaffected. An example of this doctrine is afforded by the cases holding that a statute limiting the time for a suit to annul land patents has no application to a suit to recover the value of such lands as damages for their fraudulent acquisition. *United States* v. *Whited & Wheless,* 246 U. S. 552; *Southern Pacific* v. *United States* (*No. 1*), 200 U. S. 341; *Pitan* v. *United States* (C. C. A. 8th), 241 Fed. 364. This Court has applied the same principle to an action to recover money paid by mistake. *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112; *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190.

A case which is more nearly parallel to the one at bar is *Talcott* v. *United States* (C. C. A. 9th), 23 F. (2d) 897, certiorari denied, 277 U. S. 604. There the Government interposed a counterclaim for the recovery from the plaintiff of a sum which had been refunded by mistake by the Commissioner. The plaintiff urged that the counterclaim was barred by the statute of limitations contained in the Revenue Act of 1926. The court held, however, that the counterclaim was not "a proceeding for the collection of taxes," and that it was not barred.

The principle has more recently been applied by this Court in *United States* v. *John Barth Co.,* 279

U. S. 370, wherein it was held that a suit brought by the United States upon a bond given to secure the payment of a tax was not barred by the statute limiting the time within which a suit must be brought for the collection of the tax. This Court said (p. 375):

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective.

By analogy, a provision in the Revenue Act limiting the time within which the United States may bring a proceeding against a corporate taxpayer for the collection of corporation income and excess-profits taxes does not apply to this suit in equity brought against the stockholders of such corporation after its dissolution and the distribution of its assets to its stockholders without the satisfaction of the corporation income and excess-profits taxes due the United States.

It is true that in the *Barth case* the independent remedy was founded upon a written contract and

that there is no written contract in this case, but we contend that that fact does not distinguish the cases in principle. There was no contract in the *Talcott case, supra,* and there the Circuit Court of Appeals said (p. 901):

> It is contended that recovery upon the defendant's counterclaim is barred by the statute of limitations, and reference is made to the Revenue Act of 1926, which provides (44 Stat. 114 (26 USCA Sec. 105)) that all revenue taxes, with certain exceptions, shall be assessed within four years after such taxes become due "and no proceedings in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes become due." But here the counterclaim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States.

We submit that the test under the *Barth* and *Talcott decisions* is whether the remedy against the stockholders exists independently of any right which the Government may have or might have had against the corporation for the collection of taxes; that the action against the stockholders is an independent remedy under those tests; and that no statute of limitations other than one barring that particular remedy can be raised as a defense.

The theory under which the Government or any other creditor proceeds against the stockholders of

a corporation to secure the satisfaction of a corporate liability has often been expressed by stating that the corporate assets constitute a trust fund for its creditors. *Mumma* v. *Potomac Co.*, 8 Pet. 281; *Railroad Co.* v. *Howard*, 7 Wall. 392; *Curran* v. *State of Arkansas*, 15 How. 304; *Sanger* v. *Upton*, 91 U. S. 56; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 603.

In other instances this Court has not taken the broad view that the assets of a corporation at all times constitute a "trust fund" for its creditors, but it has nevertheless held that, after a corporation has been dissolved and has distributed its assets to its stockholders without the satisfaction of its debts, a creditor of the corporation may recover from the stockholders the amount of his debt to the extent of the assets distributed to them. *Graham* v. *Railroad Co.*, 102 U. S. 148; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371; *McDonald* v. *Williams*, 174 U. S. 397; *Pierce* v. *United States*, 255 U. S. 398.

In the brief in opposition to the petition for certiorari (p. 8) it is suggested that a suit against the stockholders of a dissolved corporation is dependent upon the recovery of a judgment against the corporation and the return of an execution, unsatisfied, and that for that reason the right against the stockholders is not to be regarded as an independent remedy. As authority for the necessity of recovering a judgment against the corporation, there are cited *Pierce* v. *United States, supra*, and

Merchants Nat. Bank of Omaha v. *McDonald*, 63 Neb. 363.

The decisions of the courts on the question as to whether it is necessary to secure a judgment against the corporation where, as here, the corporation has been dissolved have not been harmonious. Where the "trust fund" doctrine has been approved, it is recognized that it is unnecessary to secure a judgment against the corporation before proceeding against the stockholders. *Terry* v. *Anderson*, 95 U. S. 628; *McWilliams* v. *Excelsior Coal Co.* (C. C. A. 8th), 298 Fed. 884. See also *Case* v. *Beauregard*, 101 U. S. 688. On the other hand where the "trust fund" doctrine has not been applied and the proceeding against the stockholders has been treated as any other creditor's bill, it is a general rule that a judgment must be secured against the corporation and execution returned unsatisfied before suit against the stockholders may be instituted. *Pierce* v. *United States, supra; Hollins* v. *Brierfield Coal & Iron Co., supra.*

To this rule, however, there are exceptions. In the *Pierce case, supra,* this Court held that it was not necessary to show a return of execution *nulla bona* within the district where the suit is brought if it is agreed that the debtor had no property out of which the judgment could have been satisfied at law. In the *Merchants National Bank case, supra,* upon which the respondent also relies, the Supreme Court of Nebraska recognized that exceptions exist.

The rule itself is apparently based on the theory that equity has no jurisdiction to enforce a simple contract debt and that before applying for relief in equity the creditor must acquire an interest in the corporate property or equitable jurisdiction must be established on other grounds, as, for example, where the obtaining of a judgment against the corporation would be a futile step in the process of collection. *Flash* v. *Conn,* 109 U. S. 371.

In cases brought by the United States to enforce the liability of stockholders arising from their receipt of corporate assets prior to the satisfaction of its tax liability, it has been assumed that it is not necessary to secure a judgment against the stockholders. In *United States* v. *Fairall,* 16 F. (2d) 328, and in *Updike* v. *United States,* 8 F. (2d) 913, it was held that it was unnecessary to secure a judgment against the corporation under such circumstances.

Whether or not there is a trust in a strict sense, and whatever the precise nature of this liability, it is generally held that in any case where the liability of the stockholders of a corporation for its debts arises only by reason of the insolvency or dissolution of the corporation, the right to proceed against the stockholders is a new and independent remedy. *McDonald* v. *Thompson,* 184 U. S. 71; *Whitman* v. *Oxford National Bank,* 176 U. S. 559; *Terry* v. *Anderson, supra; Terry* v. *Tubman,* 92 U. S. 156; *George* v. *Wallace* (C. C. A. 8th), 135 Fed. 286; *United States* v. *Armstrong, supra.*

That the cause of action which the creditors of a corporation acquire against its stockholders upon the dissolution or insolvency of the corporation is a distinct cause of action is also shown by cases involving State statutes which create such a liability without prescribing the form of the remedy. In such cases it is held that the form of action to be employed is that which is appropriate to the nature of the liability created by the statute, whether it be a suit in equity, action on the case, assumpsit or debt. *Mills* v. *Scott*, 99 U. S. 25; *Carrol* v. *Green*, 92 U. S. 509; *Terry* v. *Little*, 101 U. S. 216; *Flash* v. *Conn*, *supra;* Thompson on Corporations (3d ed.), Vol. 6, Sec. 5105.

In none of these authorities, nor in any decided case which has been found, has it been held that the form of the action against the stockholders is controlled by the nature of the original claim against the corporation.

It is also well settled that where the stockholders of a corporation become liable for its debts only upon the insolvency or dissolution of the corporation, whether by statute or by equitable principles, the cause of action against them does not arise and the statute of limitations does not begin to run against them until the happening of the event—that is, insolvency or dissolution—which makes them liable. *Terry* v. *Tubman*, *supra; Carrol* v. *Green*, *supra; Terry* v. *McLure*, 103 U. S. 442; *Taylor* v. *Bowker*, 111 U. S. 110; *Bernheimer* v. *Converse*, 206 U. S. 516; *Richards* v. *Carpenter*

(C. C. A. 6th), 261 Fed. 724; Clark and Marshall, Private Corporations, Vol. 3, p. 2631; Thompson on Corporations, (3d ed.), Vol 7, Secs. 5219–5231. Under this rule it is plain that there can be no statute of limitations which runs concurrently against a corporation and its stockholders. See *Crissey* v. *Morrill* (C. C. A. 8th), 125 Fed. 878.

Moreover, the statute of limitations which governs a suit against the stockholders of a corporation to enforce a right against them which arises upon the insolvency or dissolution of the corporation is the statute applicable to the particular form of action under which the remedy against the stockholders is pursued. *Mills* v. *Scott, supra; Terry* v. *Tubman, supra; Fourth National Bank* v. *Francklyn,* 120 U. S. 747; *Carrol* v. *Green, supra; Platt* v. *Wilmot,* 193 U. S. 602; *Crissey* v. *Morrill, supra; Boyd* v. *Mutual Fire Asso.,* 116 Wis. 155; *Bourne* v. *Baer,* 107 Neb. 255; Clark and Marshall, Private Corporations, Vol. 3, pp. 2627–2630.

In none of the cases cited nor in any case relied on by the respondents in their brief in opposition to the petition for certiorari has it been held that the statute of limitations which would control a suit against the stockholders of a corporation to enforce a liability arising as the result of the insolvency or dissolution of the corporation is the statute which would govern a suit against the corporation. That the stockholders' liability is not controlled by the statutes of limitation relating to the corporation is recognized in *Mills* v. *Scott, supra; Van Hook* v.

Whitlock, 3 Paige (N. Y.) 409; *Powell* v. *Oregonian Ry. Co.,* 38 Fed. 187; Clark and Marshall, Private Corporations, Vol. 3, pp. 2631–2635.

In the *Oregonian Ry. Co. case,* where a judgment was obtained against a corporation for waste, and an action was brought against the stockholders to subject the unpaid balance of their stock to the payment of the claim, it was held that the cause of action against the stockholders accrued when the corporation became insolvent, and that the applicable statute of limitations was the one which related to contracts, express or implied, and not that relating to actions for waste.

The decisions recognizing that a different statute of limitations applies to causes of action accruing to creditors against the stockholders, after the insolvency or dissolution of a corporation, are aided by cases which recognize that in such actions the stockholders may avail themselves of defenses which would not be available to the corporation in a suit against it. This Court in *Ward* v. *Joslin,* 186 U. S. 142, held that a stockholder could interpose the defense of an *ultra vires* contract, which, because of benefits received by it under the contract, the corporation could not have done if it had been sued. Similarly, in *Ramsden* v. *Knowles,* 151 Fed. 718, it was held that where the right of a creditor of a foreign corporation to enforce a statutory liability of stockholders was fixed on the dissolution of the corporation, such liability was not affected by the subsequent extinction of the creditor's remedy

against the corporation. In *Close* v. *Potter,* 155 N. Y. 145, the court took the view that an action by a creditor to charge a stockholder of a corporation for a debt represented by a promissory note was not governed by rules controlling commercial paper and the fact that the plaintiff was a *bona fide* holder would not prevent the defendant from setting up defenses which the corporation could not, the cause of action being entirely independent. *Cf. Dickinson* v. *Kline,* 96 Neb. 435; *McWilliams* v. *Excelsior Coal Co.* (C. C. A. 8th.), 298 Fed. 884.

In view of these well-established principles governing suits in equity similar to this proceeding, it is submitted that the right of the United States to proceed against the stockholders of the Updike Grain Company was an independent remedy not controlled by any statute of limitations which might have applied to a suit against the corporation for the collection of taxes. The only statute of limitations which would apply to such action would be one enacted with specific reference to this independent cause of action and none has been cited.

II

EVEN THOUGH IT SHOULD BE CONCEDED THAT THE DEFENSE OF A STATUTE OF LIMITATIONS RELATING TO THE COLLECTION OF TAXES WAS AVAILABLE TO THE RESPONDENTS, SUCH DEFENSE FAILS IN THIS CASE FOR THE REASON THAT THE RETURNS REQUIRED BY LAW HAVE NOT BEEN FILED, WITHOUT WHICH NO STATUTE OF LIMITATIONS HAS BEEN SET IN MOTION

Conceding for the sake of argument that the same statutes of limitations are applicable to this pro-

ceeding as would be applicable if it were a suit against the corporation to collect the taxes involved, the Government's position is that under the facts of the case the suit is not barred.

The particular statute of limitations which the court below held to constitute a bar to a direct proceeding against the Updike Grain Company for the collection of taxes is Section 278 (d) of the Revenue Act of 1926 (p. 46, *infra*). The Circuit Court of Appeals in effect has held that in this section Congress prescribed a period of six years after assessment for the collection of all taxes imposed under that Act or under prior Revenue Acts, subject only to the proviso that the assessment must not have been barred when made. It has concluded that the assessment in 1920 in this case was not barred when made and hence that the time for bringing suit expired in 1926, prior to the institution of the suit in 1927.

It is submitted that the language of Section 278 (d) should not be so broadly construed. The provision is that the period of six years shall apply when the assessment has been made (whether before or after the enactment of the Act) "within the statutory period of limitation properly applicable thereto." A requirement that an assessment shall not have been barred when made and a requirement that the assessment shall have been made within a prescribed statutory period of limitations are not the same. To bring this assessment within

the terms of Section 278 (d), it must be determined that the assessment was made within a prescribed period of limitation.

It should be noted that the Revenue Act of 1917, c. 63, 40 Stat. 300, contained no period of limitations as to assessment or collection. The Revenue Act of 1918, c. 18, 40 Stat. 1057, which was in effect when the tax in the instant case was assessed, also contained no provision limiting the time for the assessment and collection of taxes imposed under the Revenue Act of 1917. It seems, therefore, that under any view of the facts in the instant case an assessment of 1917 taxes made in 1920 could not fulfill the requirements of Section 278 (d), for the reason that it was made when there was no period of limitation applicable to such assessment.

The limitation provisions contained in Section 250 (d) of the Revenue Act of 1921 (pp. 41–42, *infra*), Section 277 (a) (2) of the Revenue Act of 1924 (p. 42, *infra*), and Section 277 (a) (3) of the Revenue Act of 1926 (p. 45, *infra*), are to the effect that taxes imposed under the Revenue Act of 1917 shall be assessed within five years after the return was filed. These provisions clearly relate to assessments which had not been made at the time of the passage of the Acts in which they appear, and are not such statutes as should be consulted for the purpose of determining whether an assessment made in 1920, prior to the passage of

any of the Acts in question, has been made "within the statutory period of limitation properly applicable thereto."

But, assuming that the limitation provisions in Acts passed subsequently to the making of the assessment were applicable, there is excluded from their operation all cases where there has been a failure to file a return or where a false and fraudulent return has been filed with intent to evade tax. In such cases the assessment can be made "at any time." Section 250 (d) of the Revenue Act of 1921 (pp. 41–42, *infra*); Section 278 (a) of the Revenue Act of 1924 (p. 43, *infra*), and Section 278 (a) of the Revenue Act of 1926 (p. 45, *infra*). The only difference in the language of these provisions is that the Revenue Act of 1921 makes use of the phrase "failure to file a required return," whereas the later Acts use the phrase "failure to file a return." The Circuit Court of Appeals considered this difference in language immaterial. In view of the fact that under all three statutes the five-year period of limitation runs from the filing of "the return" and not "the required return," it is clear that the change in language is not significant.

In the instant case the only return which could have set in motion the five-year period of limitation upon assessment would have been a return filed in behalf of the taxpayer in accordance with the requirements of Section 13 (b) of the Revenue Act of 1916 as amended by the Revenue Act of 1917 (p. 41, *infra*), and with the requirements of Article

61 of Regulations 33, Revised (p. 49, *infra*). No such return was filed. The former secretary of the Updike Grain Company was aware of these requirements but neither he nor any other officer or stockholder filed a return for the corporation under the provisions of the Revenue Act of 1917. (R. 87–95.)

In the instant case it was contended in the courts below that returns filed in behalf of the corporation under the Revenue Act of 1916 and the Revenue Act of March 3, 1917, for the fiscal period ended June 30, 1917, served to set in motion the statute of limitations, or, in the alternative, that returns prepared in the Internal Revenue Bureau, or the report of the Revenue Agent on the basis of which the assessment was made, constituted returns which set in motion such statute of limitations. The District Court adopted the view that the agent's report constituted "the return," but the Circuit Court of Appeals rejected both contentions and conceded that this was a "no return" case, as it had under similar facts in *Updike* v. *United States,* 8 F. (2d) 913, certiorari denied, 271 U. S. 661.

Little argument is required to establish that a return prepared by the Commissioner or by a revenue agent or the latter's report of an investigation of tax liability is not such a return as will set in motion the statute of limitations against the Commissioner or the taxpayer. The Revenue Acts place upon the taxpayer the *duty* of filing a return and he is penalized for failing to do so. Furthermore, the *filing* of the return marks the beginning of the statu-

tory period of limitation. The act of the Commissioner in placing a return prepared by him or by one of his agents in his own files would lack the formality necessary to start the running of the statute. Inasmuch as the statute is intended to benefit the taxpayer, he should have notice of the act which marks the beginning of the period. He would be without notice of the time or even the approximate time when a return was prepared and filed by the Commissioner. It is only with respect to the return prepared by the taxpayer that any significance can be attached to the *filing* of the return, for by that act the taxpayer places his return beyond his control and within the Commissioner's control. It should be remembered that the Government can assess a tax without any return whatever. *United States* v. *Haar* (C. C. A. 5th), 27 F. (2d) 250. It may likewise bring an action to collect taxes without an assessment. Section 278 (a) of the Revenue Act of 1926 specifically so provides. See also *Dollar Savings Bank* v. *United States,* 19 Wall. 227; *United States* v. *Chamberlin,* 219 U. S. 250; *United States* v. *Ayer* (C. C. A. 1st), 12 F. (2d) 194.

Nor did the returns prepared and filed for the corporation under the Revenue Act of 1916 and the Revenue Act of March 3, 1917, meet the requirements of the statute as to the filing of returns under the Revenue Act of 1917. The Revenue Act of 1917 imposed taxes at increased rates and contained changed provisions as to corporations. The

regulations of the Treasury Department, Article 61 of Regulations 33, Revised (p. 49, *infra*), specifically required that corporations which had dissolved in 1917 prior to the passage of that Act should file returns under it on forms prescribed for that Act and pay the taxes due, obtaining credit for the taxes previously paid on returns filed prior to the passage of the Revenue Act of 1917. The validity of these regulations has been sustained in *Updike* v. *United States, supra; Beam* v. *Hamilton* (C. C. A. 6th), 289 Fed. 9.

An examination of the various periods of limitation discloses without doubt that it has been the intention to divide taxpayers into two classes: (1) those who in good faith file the returns required by the law imposing the tax, and (2) those who fail to file the required returns or file false and fraudulent returns with intent to evade tax. As to the first class, the law provides that taxes imposed under the Revenue Act of 1917 shall be assessed within five years after the return was filed, and under Section 278 (d) of the Revenue Act of 1926 that collection must be made within six years after assessment. This period of limitations was conferred upon a class of taxpayers who had complied with the law. It was an act of grace on the part of the Government. *In re McClure Co.,* 21 F. (2d) 538, 540. As to the second class, to which the Updike Grain Company belongs, no benefit was conferred, and the assessment could be made "at any time."

It follows that the assessment in 1920 was not one which was made within any prescribed period. An assessment which can be made "at any time" is not made within "a statutory period of limitation properly applicable thereto" within the meaning of Section 278 (d). To hold otherwise would be to disregard the ordinary meaning of the words employed. The word "period" means a stated interval of time. *People ex rel. Healy* v. *Leask,* 67 N. Y. 521, 528; Words and Phrases, 3rd Series, p. 946. The word "limitation" used with reference to time means the time within which an action may be brought or a thing done. 37 Corpus Juris 664; *Keyser* v. *Lowell* (C. C. A. 8th), 117 Fed. 400, 403. The phrase "statutory period of limitation" is commonly thought of in terms of years, months and days.

In reaching the conclusion that Section 278 barred this proceeding, the Circuit Court of Appeals seems to have relied chiefly upon changes introduced by Section 277 (a) (1), (2) and (3) of the Revenue Act of 1926 (pp. 44–45, *infra*), as showing an intent on the part of Congress to fix one period (for example, five years) for the initial move against the taxpayer, whether by assessment or by suit without assessment, and a different period (for example, six years) for the second move, namely, distraint or court proceedings after assessment. The changes made in Section 277 (a) (1) and (2) of the Revenue Act of 1924 (pp. 42–43,

infra) by the Revenue Act of 1926 was the introduction of the words "without assessment" after the words "no proceeding in court," so that Section 277 (a) of the latter Act provides merely that no proceeding in court without assessment shall be begun after a designated period.

It is submitted that this construction, which for reasons stated above is contrary to the plain language of the section, is not justified on the ground that it represents the probable intent of Congress. It was no doubt the intention of Congress (where the taxpayer had complied with the law in filing an honest return) to prescribe one period for assessment and another period for collection, but the language of the section does not show that it was its intention to prescribe two periods in every instance.

In view of the fact that assessments in fraud cases as well as in "no return" cases can be made at any time (Section 250 (d), Revenue Act of 1921; Section 278 (a), Revenue Act of 1924, Section 278 (a), Revenue Act of 1926 (pp. 41, 43, 45, *infra*)), the more reasonable inference is that Congress did not intend to restrict the Government in such cases. Without strong indication to the contrary, it should not be considered that Congress intended to place any time limit upon the Government's right to enforce collection from a taxpayer whose intent has been to defraud the Government.

The construction of Section 278 (d) in the manner advocated by the Circuit Court of Appeals would have the effect of barring the Government's right six years after the assessment in such cases notwithstanding the apparent purpose of the provision to extend rather than to curtail the Government's rights. *Cf. Russell* v. *United States, supra.*

The result of the Circuit Court of Appeals' construction of Section 278 (d), moreover, is to bar retroactively a proceeding which, except for the passage of the Revenue Act of 1926, could have been instituted at any time, for Section 250 (d) of the Revenue Act of 1921 provided that collection as well as assessment could be enforced at any time where no return was filed, and this situation was not altered by the passage of the Revenue Act of 1924, for that Act did not affect an assessment made in 1920. *Russell* v. *United States, supra.* Consequently, at the time of the passage of the Revenue Act of 1926 the Government had an unlimited time within which to start this proceeding.

This Court has held that a statute of limitations should not be given retroactive effect or be construed to change the status of claims fixed under earlier provisions unless the legislative purpose to do so clearly appears. *United States* v. *Magnolia Co.*, 276 U. S. 160; *Russell* v. *United States, supra.* The mandate of Congress in the instant case is not so evident as to require a construction of Section 278 (d) which will have this effect, particularly in

view of the fact that the statute would not in that event have given the United States a reasonable time after its enactment to institute this proceeding. *Terry* v. *Anderson, supra.* The rule of construction to the effect that the United States is not bound by a statute of limitations unless it clearly applies should be given effect here. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456; *United States* v. *St. Paul, M. & M. Ry. Co.,* 247 U. S. 310.

It may be urged that the case is in some manner controlled by Section 1106 (a) of the Revenue Act of 1926 (p. 48, *infra*). That section, however, can operate only upon existing statutes of limitations. Unless there is involved a case where some statute of limitations already operates as a bar, Section 1106 (a) could not apply. It is our contention that no statute of limitations bars this suit by the United States against the stockholders of the dissolved corporation, and that none would have barred a suit against the corporation if it had remained in existence. If that is true, then Section 1106 (a) is without application here.

Even if Section 1106 (a) had any application to this case, the repeal of the section as of the date of its enactment by Section 612 of the Revenue Act of 1928 (p. 49, *infra*), has eliminated it as a defense. The plain purpose of the latter provision was to restore conditions to the exact status which they would have occupied had Section 1106 (a) of the Revenue Act of 1926 never been enacted.

In *United States* v. *John Barth Co.*, 279 U. S. 370, the question was raised as to whether it was within the power of Congress to enact Section 612 of the Revenue Act of 1928, but this Court decided the case without passing upon that question. The Government's position, then and now, is that Congress has the power to repeal retroactively a statute which extinguishes a liability for taxes. Support for that position is found in cases which recognize that Congress has power to ratify and legalize the collection of an unauthorized tax. *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *United States* v. *Heinszen & Co.*, 206 U. S. 370. The case of *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, which may be cited as authority to the contrary, is not in point. It dealt not with taxes, but with a statute limiting the time for filing claims for damages against a railroad.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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Solicitor General.

G. A. YOUNGQUIST,
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Special Assistants to the Attorney General.

FEBRUARY, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 13 (b) of the Revenue Act of 1916, c. 463, 39 Stat. 756, 771, which is incorporated in the Revenue Act of 1917 by Section 1001, c. 63, 40 Stat. 300, 325, of that Act, provides:

> SEC. 13. (b) Every corporation, * * * subject to the tax herein imposed, shall * * * render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, * * * where are kept its books of account and other data from which the return is prepared, * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part as follows:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under

any return made under this Act for the taxable year 1921 * * * and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, * * *; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *: *Provided further,* That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, provides in part as follows:

SEC. 277. (a) * * *.

(1) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this Act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917 * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (U. S. C., Title 26, Sec. 1058.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 55–56, 58 59, 61, 113, 121, provides in part as follows:

SEC. 2. (a) When used in this Act—

* * * * *

(9) The term "taxpayer" means any person subject to a tax imposed by this Act. U. S. C. App., Title 26, Sec. 1262.

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in

section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * * (U. S. C. App., Title 26, Sec. 1048.)

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment. (U. S. C. App., Title 26, Sec. 1049.)

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector. (U. S. C. App., Title 26, Sec. 1050.)

SEC. 277. (a) Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. (U. S. C. App., Title 26, Sec. 1058.)

* * * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods—then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the

period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under subdivision (a) of section 274 to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter. (U. S. C. App., Title 26, Sec. 1069.)

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, Sec. 1249.)

SEC. 1122. (b) The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of

injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions. (U. S. C. App., Title 26, Sec. 1257.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 875, provides in part as follows:

SEC. 612. *Repeal of Section 1106 (a) of 1926 Act.*

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

Article 61, Treasury Regulations 33, Revised:

Corporation dissolved prior to October 4, 1917.—A corporation which was dissolved in 1917, prior to passage of the war-revenue act of October 3, 1917, is subject to tax under the act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the act of October 3, 1917. (*Brady et al.* v. *Anderson,* 240 Fed. 665.) A corporation so situated will make a return on revised form 1031, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have

paid any excess profits tax under the act of March 3, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the act of October 3, 1917.

Article 10, Treasury Regulations 41:

Corporations.—Every domestic corporation which has for the taxable year a net income of $3,000 or more is, unless exempt under article 13, required to make a return and to pay the tax, if any.

Every foreign corporation which has for the taxable year a net income of $3,000 or more from sources within the United States is, unless exempt under article 13, required to make a return and to pay the tax, if any.

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SEP 16 1929

CHARLES ELMORE CR
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In the Supreme Court of the United States

No. 340

October Term, 1929

UNITED STATES OF AMERICA, Petitioner,

vs.

NELSON B. UPDIKE, et al.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS A. BROGAN,
ALFRED G. ELLICK,
ANAN RAYMOND,
Solicitors for Respondents.

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In the
Supreme Court of the United States

No. 340

October Term, 1929

UNITED STATES OF AMERICA, Petitioner,

vs.

NELSON B. UPDIKE, et al.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now the respondents (except George A. Roberts and Ed P. Smith) and object to the petition for a writ of certiorari presented in this proceeding, upon the following grounds:

1. Because the petition was not presented to this court within three months from the entry of the decree of the Circuit Court of Appeals, as required by Secs. 347 and 350 of Title 28 of the U. S. Code.

2. Because the reason relied upon for allowance of the writ is not sufficient under Rule 38 of this court.

3. Because the contention that a suit against the transferees may be maintained against stockholders on the sole ground that they were transferees of the assets of a corporation, after the cause of action against the corporation itself has been ex-

tinguished by the statute of limitations, is frivolous, without merit and was fully covered by the decision of this court in *Russell vs. United States,* 278 U. S. 181; and because this court has not approved the so-called trust fund doctrine for the maintenance of suits against stockholders, but has distinctly repudiated it.

4. The construction placed by the District Court and the United States Circuit Court of Appeals upon Section 278 (d) of the Revenue Act of 1926 is in accordance with the obvious intention of Congress to place a limitation upon proceedings in court for the collection of taxes at the expiration of six years from the time the assessment was made.

———o———

BRIEF IN SUPPORT OF OBJECTIONS

1. The application is not made within the time fixed by statute.

We are aware of the numerous decisions in which this court has held that for the purpose of review by appeal or writ of error, a judgment or decree of the lower court does not become final until a motion for new trial or petition for rehearing, properly made under the rules of the court and considered by it, has been disposed of.

We suggest that these rulings are not applicable to the present statute providing for writs of certiorari. In the numerous cases upon which the Government apparently has relied, it has been held that an appeal or writ of error can be taken only from a final judgment, and the judgment is not final while the court is considering a motion for new trial or a petition for rehearing. The amendment of February 13, 1925, (43 Statutes at Large 938) for the first time provides that it shall be competent for this court to grant a writ of certiorari "either before or after a judgment or decree by such lower court." It is apparent that the finality of a judgment or decree is no longer a prerequisite to a petition for a writ in this court, and, therefore, the reasoning of the line of cases which extended the time for an appeal or writ of error, is no longer applicable. The present statute should be construed according to its plain language, and its intent and purport. Sec. 350 Title 28 U. S. C. is free from ambiguity to the effect that no writ of certiorari shall be allowed unless application therefor be made within three months after the *entry* of such judgment or

decree. This decree was entered on the 25th day of March, 1929 (Tr. p. 399). The petition was filed in this court on August 23, 1929, five months after the entry of the decree.

> See *Toledo Co. v. Computing Co.*, 261 U. S. 399-417.

It is to be noted that in the application for stay of mandate made by the petitioner in the Circuit Court of Appeals (Tr. pp. 400-3), filed on June 3, 1929, after the overruling of the motion for rehearing, the court is requested to stay the issuance of a mandate until June 28, 1929, in order that the petition for the writ may be filed in this court prior to that date, and in the order staying the issuance of the mandate (Tr. p. 402), the stay is granted on condition that the petition should be filed in this court on or before June 28, 1929.

———o———

2. Reason relied upon for allowance of the writ is not sufficient under Rule 38 of this court.

The sole reason relied upon for seeking an allowance of a writ of certiorari herein is one of those specified in subdivision (b) of paragraph 5 of Rule 38 of this court, to-wit:

> The Circuit Court of Appeals "has decided an important question of Federal Law which has not been, but should be, settled by this court."

This reason is only assigned in respect to one of the points raised in the Government's brief, namely that in a suit in equity under the trust fund theory against

transferees of the assets of a dissolved corporation, to collect taxes due from such corporation, the limitation provisions in Section 278 (d) of the Revenue Act of 1926 are not applicable. This is no longer an important question, nor is it one that has not been settled by this court.

It is no longer important because, as will be hereinafter disclosed, all departments of the Government have heretofore recognized and acquiesced in the doctrine that when a claim for taxes already assessed against the taxpayer, has been barred by limitation provisions in the Revenue Laws, it is barred against the transferees of the assets of such taxpayer.

Congress.

Section 280, Revenue Act 1926.

Section 311, Revenue Act 1928.

Statement of the Managers on the part of the House, in conference report to the House, dated February 22nd, 1926, pages 43-44.

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G. C. M. 4554, Int. Rev. Bul. VII-33-3848

Board of Tax Appeals.

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Wheeler vs. Commissioner, 16 B. T. A. 96.

Hynes vs. Commissioner, 16 B. T. A. 1272, approving and following opinion of Circuit Court of Appeals in this case.

Federal Courts.

United States vs. Snook, 24 Fed. (2d) 844.

United States vs. Lazenby, 5 Fed. (2d) 827.

The Treasury Department having heretofore at all times recognized this rule it must be assumed that they have been alert to proceed against all transferees, either in equity or under Section 280 of the Revenue Act of 1926, or Section 311 of the Revenue Act of 1928, within the period of limitation prescribed in the Revenue Laws upon the collection of income taxes.

Cases where they have not must now be rare, if any, other than the instant case.

It is also urged that this question will arise often should Section 280 be held unconstitutional. In this respect the Government has fully protected itself in Section 311 (d) Revenue Act 1928, wherein the running of the statute of limitations against transferees is expressly suspended "(***if a proceeding in respect of the liability [of a transferee] is placed on the docket of the Board, until the decision of the Board becomes final), and for sixty days thereafter."

The question is furthermore no longer important because, as will hereafter be shown herein, it has been settled by this court in *Russell vs. United States*, 278 U. S. 181.

For a clear, convincing and complete disposition of the points herein raised, see opinions below of Honorable T. C. Munger, D. J., 25 Fed. (2d) 746, and of Honorable G. T. McDermott, C. C. A., 32 Fed. (2d) 1.

3. Proceedings in court against transferees for the collection of taxes of the transferor are barred whenever such proceedings would be barred against the transferor.

It is suggested in the brief of the Government as a reason for granting the writ, that the case raises a question which has not heretofore been decided by this court, as to whether a provision in the Revenue Act limiting the time within which the United States may begin a proceeding for the collection of taxes, applies to a suit in equity brought by the United States under the trust fund theory against the stockholders of a dissolved corporate taxpayer. An examination of the case will disclose that the obvious reason why it has not been decided is because it is so frivolous that it has never before been raised. The Government's contention under this heading is based upon an erroneous understanding of the relations between stockholders of a corporation to whom the assets have been transferred, and the liabilities of the corporation. The revenue laws do not create any liability upon the part of such stockholders. It is not claimed that there is any liability on the part of the stockholders of a Nebraska corporation under any Nebraska laws to pay its debts. The sole liability

therefore asserted against them is that which arises under the general rules of equity, respecting the liability incurred by stockholders to whom the assets are distributed upon dissolution, without paying the debts of the corporation. This liability is not original, but is ancillary to the liability against the corporation itself. The suit is not a separate, but a dependent proceeding. In Nebraska, as in many of the other states, a proceeding against the stockholders of a corporation to collect the obligations of the latter, to the extent of assets distributed to the stockholders, is dependent upon the recovery of a judgment against the corporation and the issuance of an execution, followed by a return of no assets of the corporation.

> *Merchants National Bank v. McDonald*, 63 Neb. 363.

This court has approved the doctrine in the Nebraska case as being a part of the rules of equity jurisdiction and procedure, in the case of *Pierce vs. United States*, 255 U. S. 398. In that case it is said (p. 402): "A judgment creditor's bill is in essence an equitable execution." Again the court says in that case:

> "But when a corporation devests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied."

Moreover, this court has distinctly repudiated the trust fund doctrine relied upon by the Government in this case, which, although it still receives support in decisions of the lower courts, has never yet been reinstated by this court.

In *Hollins v. Brierfield Coal & I. Co.*, 150 U. S. 371, cited with approval by this court in *Pierce vs. United States*, 255 U. S. 398, it is said (p. 383):

> "Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."
>
> *Graham vs. LaCrosse*, 102 U. S. 148.

The theory of the Government in this case runs counter to the elementary rules of law on the subject of the relation between a debtor and a transferee of the debtor's assets. The Government cites no case in which it has ever been held that any cause of action exists against the transferee of assets, after it has ceased to exist against the principal debtor, the transferor. On the other hand, there are numerous cases holding that even when the liability against the transferor has been reduced to judgment, proceedings against a transferee must be abandoned, whenever the liability of the transferor ceases, either by the statute of limitations or by the judgment becoming dormant, or otherwise.

Dole v. Wilson, 39 Minn. 330.

Wood v. Carpenter, 101 U. S. 135.

Newell v. Dart, 28 Minn. 243.

Flagg v. Flagg, 39 Nebr. 229.

Scott v. Neely, 140 U. S. 106.

In the case last cited, the court said:

> "In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment."

At the time this suit was brought, Sec. 1106 (a) of the Revenue Act of 1926 was in effect and read as follows:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability."

As to whether the subsequent repeal of that section while this case was pending should operate to deprive these defendants of its effect, might be a question. If there was no cause of action against them at the time the suit was brought, because the liability against their transferor had been extinguished by this statute, it is difficult to conceive how a liability could be created by its mere repeal.

Peerless Woolen Mills, 13 B. T. A. 1119.

U. S. vs. John Barth Co., 27 Fed. (2nd) 782 (7th C C A).

But we need not rely on that section of the statute for support of the contention that the bar of the statute against the transferor extinguished the liability for all purposes.

It is a general rule of law that when in any statute which creates a liability, or in any statute amendatory or supplemental thereto, a limitation is placed upon the time for enforcing the liability, the running of the statute in that case not only bars the remedy, but extinguishes the liability.

Harrisburg v. Rickards, 119 U. S. 199.

Davis v. Mills, 194 U. S. 451.

Phillips v. Grand Trunk Ry., 236 U. S. 662.

The case of *Russell vs. United States*, 278 U. S. 181, is exactly in point. The suit was brought by the Government against stockholders of a corporation to recover taxes assessed against the corporation for the year 1918. The sole defense of the stockholders was the various statutes of limitation enacted since the taxable year, prior to the 1926 Act. The court discusses such sections as were relied upon, and reaches the conclusion that the transferees were free from liability under the five year limitation contained in the Act of 1918, and continued by the Act of 1929, and if Sec. 278 of the Act of 1924 relates only to assessments made after June 2, 1924, they were not liable. It concludes that the purpose of the

Act of 1924 was not to extend as against the transferees a limitation which had expired under the earlier acts. Obviously, therefore, the sole question presented to the court and considered and decided was whether a limitation which applied to the transferor was available to the transferee. The court held that it was. The transferor was not in court.

Referring to the *Russell* case, in the Government's brief, it is said that the decision in that case on the question raised herein should not be followed in this case, "because while it existed in the record in that case, it was not raised nor considered, either in the lower courts or in this court." If the theory of the Government on this question is so sound, it would be interesting to know why it was not raised in the Russell case, when that case was argued before this court on November 22d, 1928, or before the Board of Tax Appeals in the cases of *Hammersly vs. Commissioner* and *Wheeler vs. Commissioner,* supra, decided in April, 1929, and in *Hynes vs. Commissioner,* supra, decided in June, 1929, which was a case of identical facts with this case, whereas we find that it was being vigorously urged in this case at the trial in the District Court, before Honorable T. C. Munger, Judge, as early as March 26th, 1928, and in the Government's brief, filed in the Circuit Court of Appeals on November 9th, 1928, and was repudiated by both courts.

If it should be said, as it must, that it could not be urged in cases pending before the Board of Tax Appeals, under Section 280, Revenue Act 1926, because that section expressly made available to transferees the limita-

Note:

Hammersly v. Commissioner, 16 B. T. A. 68, acquiesced in by Commissioner of Internal Revenue, Ruling No. VIII-29-4274, Int. Rev. Bull. issue July 22, 1929.

Wheeler v. Commissioner, 16 B. T. A. 96, acquiesced in by Commissioner of Internal Revenue, Ruling No. VIII-31-4290, Int. Rev. Bull. issue Aug. 5, 1929.

tion provisions in the Revenue Laws, then we would have the anomalous and inequitable situation of Congress giving to a transferee the benefits of such limitation provisions, when proceeded against under Section 280, but denying to him the same benefits whenever the Government should elect to proceed against such transferee in a suit in equity.

The decision of this court in *United States v. Mitchell,* 271 U. S. 9, relied on by the Government in this case, does not require this court to reopen a settled question, whenever a new argument is discovered or conceived on one side or other of the controversy. That case merely holds that a question cannot be considered as disposed of in a former opinion, merely because it was in the record. But this relates to the ultimate question itself, not to mere arguments in support of a contention concerning it.

The case of *United States v. Barth Co.,* 279 U. S. 370, is clearly not in point. The suit was upon a bond in which the taxpayer and a surety had expressly contracted with the Government to pay any tax which the Commissioner should assess. The purpose of the bond was to protect the Government against the running of the statute of limitations and other contingencies which might arise, if the taxpayer were not required to pay the tax immediately. Here the transferees are not liable because of any engagement entered into by them, and personally they would not be liable at all if they had not received and had not retained assets of the corporation which ought to be applied in payment of its debts. Neither

is the case of *Talcott vs. United States,* 23 Fed. (2d) 897, in point, because that was not a suit to collect taxes, but to recover money paid by mistake.

The analogy which the Government seeks to find between this case and those cases in which it was held that the statute limiting the time when the Government might sue to set aside a patent on the public lands on the ground of fraud, did not bar a suit to recover damages for the fraud, does not exist, obviously. The two cases were independent of each other and this court has held that an election to pursue one remedy would bar the other.

U. S. v. Oregon Lbr. Co., 260 U. S. 290.

But there is no election required when a creditor pursues the assets of a debtor. See *Pierce v. U. S.,* 255 U. S. 398, where the Government in a proceeding to collect money from a corporation, had brought an equitable suit to pursue the assets in one jurisdiction, and later had brought a bill in equity against the stockholders, who were transferees of the assets, in another jurisdiction. The obvious basis for the ruling that there is no election is that the principal claim is the debt against the corporation, and suits against transferees are ancillary proceedings to enforce that debt, and relate to and are governed by the status of the debt against the transferor.

Another reason why this court has not heretofore been called upon to pass on this pseudo trust fund doctrine, is because the Government itself in numerous

rulings has held that there is the same limitation for the transferees, as the transferor.

In General Counsel's memorandum, No. 1029, Internal Revenue Bulletin, VI-2-3042, it is said:

> "The logical conclusion is that it was not the purpose of Congress to make effective against a transferee, a tax liability which at the time of the enactment of the Revenue Act of 1926, could not be asserted against the transferor taxpayer, because of the bar of the statute of limitations."

Also, in General Counsel's memorandum, No. 4554, I. R. B. VII-33-3848, p. 3, there was under discussion the question whether a transferee who had been assessed under Sec. 280 of the Revenue Act of 1926, after the tax had been barred against the taxpayer, would be entitled to a refund under Sec. 607 of that Act, which provides that any tax paid after the expiration of the period of limitation properly applicable thereto, shall be considered an overpayment and refunded. The Counsel says:

> "Under the provisions of section 280 of the Revenue Act of 1926 and section 311 of the Revenue Act of 1928, the assessment, collection, and payment of the liability, at law or in equity, of a transferee of the property of a taxpayer are subject to the same provisions and limitations as if a deficiency in tax were involved, except with respect to the period during which an assessment may be made."
>
> "Since the liability involved in the instant case was assessed after the expiration of the statutory period properly applicable thereto, the amount paid in respect to the assessment must be regarded as an over-payment."

In the case of *Marion Parsons Spencer,* 11 U. S. B. T. A. 437, a proceeding before the Board of Tax Appeals under Sec. 280 of the Revenue Act of 1926 against the transferee of the assets of the estate of a decedent, it was held that because the tax against the decedent had become barred by the provisions of Sec. 250 of the Revenue Act of 1921, there was no liability against the transferee. The opinion states: (p. 440).

> "In the proceeding before us the period of limitation for the assessment of tax against the taxpayer expired prior to the exactment of the Revenue Act of 1926; assessment against the taxpayer was made within such period; and notice of the proposed assessment of the liability against the transferee was sent to such transferee within six years after the assessment against the taxpayer and within one year after the enactment of the 1926 Act. Nevertheless, the period of limitation appearing in section 280, relative to the assessment of the liability of a transferee, is necessarily predicated upon the existence of such liability. Here, by operation of section 1106 (a) of the Revenue Act of 1926, the primary liability of the transferor was extinguished and it follows that the secondary liability of the petitioner as transferee was also extinguished. Consequently, there is no liability assessable against her under the provisions of section 280 of the Revenue Act of 1926."

There are other rulings of the General Counsel and numerous of the Board of Tax Appeals to the same effect.

It may be interesting in this connection to note that this suit was originally commenced as a suit to recover taxes, and that during its pendency an attempt was made to convert it into a suit to recover money of the United

States arising from a trust. In the petition filed April 2, 1927, (Tr. Vol. 1, p. 5), is found this language:

> "This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for Internal Revenue and the collection thereof."

On pp. 7 to 10 the pleading sets out acts upon which it bases its contention that the corporation was subject to a tax in the sum of $373,911.54, and on p. 11 it is a part of the prayer that the money received by the defendants "be applied to the payment of said taxes due and owing to the complainant."

While the case was pending, the Government, desiring to change front in this matter, obtained leave to strike out the words "arising under a law of Congress providing for Internal Revenue and the collection thereof," and insert in lieu thereof, "this is a suit in equity brought by the United States, of a civil nature." (Tr. Vol. 1, p. 12; also Vol. 1, p. 5), and also (Tr. Vol. 1, p. 160) to insert a statement that the Attorney General, as well as the Commissioner of Internal Revenue authorized and sanctioned the proceedings. This change was made upon the theory that while the Commissioner had power to authorize suits for the collection of taxes, only the Attorney General could authorize a general equity suit for trust funds belonging to the United States. To sustain this latter change, it was necessary to present to the court on the trial, a letter from the office of the Attorney General purporting to be dated and signed on March 15, 1927, before the commencement of the suit (Tr. Vol. 1, p. 157), whereas it ap-

peared upon the cross examination of the witness Kinsler, United States District Attorney (Tr. Vol. 1, p. 155-6) that the letter was prepared in February, 1928, just before the trial and while the case had been pending nearly a year, and that it was predated so it would appear to have been issued before the institution of the suit.

While this court may grant a writ of certiorari to reconcile conflicting decisions of different circuit courts of appeal, it has never felt called upon to exercise that power merely to adjust differences of opinion among counsel or solicitors representing different branches of the executive department. We need not now inquire what it was that induced the Government to lend its name to a suit against these transferees, when it had held that all other transferees under like circumstances were free from liability. But we think this court is not called upon to lend its aid to prolong these proceedings.

---

4. Section 278 (d) of the Revenue Act of 1926 bars all proceedings for the collection of taxes, on the expiration of six years from the time the assessment was made.

The Section reads as follows:

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Because the term "taxpayer" is used in the clause relating to an agreement, there is an attempt in the Government's brief to argue that any limitation intended by this section can be invoked only by the taxpayer, and not by the transferees against whom an indirect liability for the taxpayer's obligations may be asserted. But it is to be noted that Secs. 277 and 278 should be read together, and throughout the various sections the language is "a proceeding in court for the collection of such tax." This is found in sub-divisions (1), (2) and (3) of Sec. 277, and in sub-divisions (a), (b), (d) and (e) of Sec. 278. Nowhere is there any language confining the benefits of these limitation provisions to the taxpayer, only. It is submitted that a proceeding against a transferee to compel the application of the transferor's property to the payment of the taxes of the transferor is just as much a proceeding in court to collect a tax, as if it were against the original taxpayer himself. In *Bowers vs. N. Y. Lighterage Co.*, 273 U. S. 346, in construing the Revenue Act of 1921 which provided that: "No suit or proceeding for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed," this court held that the word "proceeding" was broad enough to include levy of a distraint. And the court held that this provision is a

part of a taxing statute, and such laws are to be interpreted liberally in favor of the taxpayer.

Turning to the meaning of Sec. 278 itself, it is not correct that the sole purpose of the re-enactment of that section was to enlarge the remedy for the Government. It did make a definite enlargement, and also just as definite a restriction. Prior to that time there was no limitation on the collection of taxes, levied under acts prior to 1924, where the taxpayer had failed to make a return or where the return was fraudulent. If it had been the intention of Congress not to disturb that condition, there would have been no reason for changing Sec. 278(d).

The main contention of the Government throughout this case is that Sec. 278 (d) does not prevent the collection by proceeding in court of taxes more than six years after the assessment, unless the assessment was made within the statutory period of limitation properly applicable thereto, and that if there was no statute of limitation applicable thereto, the section does not apply, and on the one hand, does not authorize the suit to be brought within six years after the assessment, nor does it prevent the bringing of a suit after that time.

There are several answers to make to this construction: In the first place, the return was due in March, 1918, the assessment was made in January, 1920, and at that time there was a statute of limitations properly applicable thereto, and it was made within that time. Sec. 14 of the Act of 1916, in force at the time of the assessment in question, was as follows:

"* * * every corporation, joint-stock company or association, and insurance company, computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within 105 days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this title or by existing law; and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint-stock company or association or insurance company immediately upon the notification of the amount of said assessment; * * *"

Congress, throughout the history of these revenue laws, has adopted different forms of limitation. In some cases the limitation is upon the right to assess, in others, upon the right to collect, and in the Act of 1916, limitation is upon the time within which the discovery must be made, and a new or corrected return made by the commissioner.

Eliot Nat. Bank v. Gill, 218 Fed. 600.

National Bank v. Allen, 223 Fed. 472.

Eliot Nat. Bank v. Gill, 210 Fed. 933.

It follows that this assessment was made within the period of limitation applicable thereto, and that it comes within the literal terms of the section we are considering.

It is true that by the Act of 1921, as cited in the Government's brief, another provision was made applicable to that assessment, and it was held in the first *Updike* case that by reason thereof no limitation run upon proceedings in law for collection. But this does not change the fact that at the time the assessment was made it was made within a period of limitation applicable thereto, and, therefore, comes within the language of Sec. 278 (d) of the 1926 Act.

As the Circuit Court in its opinion (Tr. p. 396) clearly points out, when Congress amended Sec. 278 (d) of the 1924 Act, it also amended paragraphs (2), (3) and (4) of the preceding Sec. 277. Prior to the 1926 amendments these paragraphs provided, "and no proceeding in court for the collection of such taxes shall be begun" after the period fixed in each paragraph for assessment, so that prior to 1926 the period for assessment or court action was the same; the Government had to assess or sue, or assess and sue, within the fixed period.

But in 1926, in all three paragraphs the limitation on proceedings in court were qualified by inserting the words "without assessment" so that the paragraphs now read "and no proceeding in court without assessment for the collection of such taxes shall be begun."

The conclusion which the lower court draws is therefore inescapable, that Congress fixed a period for the initial move against the taxpayer, which might be by assessment, or suit without assessment, and a different period for the second move, distraint, or court proceedings after assessment.

A broader construction of this section is that the clause in question, "within the period of limitation properly applicable thereto" was inserted for the benefit of the taxpayer, so that the section would not revive a liability, which had already been barred by statutes prescribing a limitation within which an assessment could be made, and so that it would not give the Government a right under the terms of this section, to sue for the recovery of a tax within six years after the assessment was made, if at the time of the assessment, the right to make the assessment had been barred by the limitations properly applicable thereto.

Moreover, a technical construction cannot properly be given to the words "period of limitation," so that they are applicable only to a definite period found somewhere in the statute. Congress has used this language to apply to cases where no limitation was intended, as well as where a definite limitation was fixed.

Thus, in sub-division (d) of Sec. 278 of the Revenue Act of 1924, it is provided that where the assessment of a tax is made within the period prescribed in Sec. 277 or in this section, such tax may be collected, etc. But when we look for the period prescribed in this section, we find that the only period prescribed is "at any time." Likewise, in Sec. 1009 (b) of the Act of 1924, it is provided that in case of a false or fraudulent return or a failure to file a required return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment "at any time." And in sub-division (c) of the same section it is provided that where the assessment of the tax is made within

the period prescribed in sub-divisions (a) and (b), such tax may be collected by distraint, etc., yet the only period prescribed in sub-division (b) is a period described there as "at any time."

It is an elementary principle in the construction of any statute that its meaning should be construed reasonably and with a due regard to the context and the purpose and intent. The Government is asking that a forced and unnatural construction be placed upon this section for the purpose of defeating the obvious limitation which Congress intended.

If the court is in doubt about the construction of this Sec. 278 (d) of the Revenue Act of 1926, it is proper to consider proceedings in Congress while the bill was in pending.

U. S. v. St. Paul, M. & M. R. Co., 247 U. S. 310.

Ex Parte Williams, 277 U. S. 267.

In the 1926 Act, as originally drafted, and as reported by the Committee on Ways and Means of the House to the House of Representatives, under date of December 7, 1925, no change had been made in the first sentence of Sec. 278 (d) as the same appeared in the 1924 Act. In describing the scope of that sub-division in said report, it is said under the heading, "Suits to Collect Tax":

> "Sub-division (d) provides that where an assessment of tax is made such tax may be collected by distraint or proceeding in court begun within six years of the assessment of the tax or at any time prior to the expiration of any period for collection

agreed upon in writing by the commissioner and the taxpayer."

(See page 12 of Report No. 1 of the Committee on Ways and Means of the House of Representatives on House Roll No. 1, dated December 7th, 1925).

When the "Managers on the Part of the House" made the report of the Conference Committee to the House, after the bill had passed the Senate, with Subdivision (d) re-written as aforesaid, they said:

> "Amendment No. 85: This amendment rewrites in more definite language, and correcting clerical mistakes, sub-divisions (d) and (e) of section 278 of the House bill, dealing with the time within which distraint or proceeding in court may be begun after the assessment has been made."

(See page 42 of Conference Report to House of Representatives No. 356 accompanying House Roll No. 1 dated February 22, 1926).

For the foregoing reasons we respectfully submit that the application for a writ of certiorari herein should be denied.

FRANCIS A. BROGAN,

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Solicitors for Respondents.

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No. 340, October Term, 1929

In the Supreme Court of the United States

October Term, 1929

UNITED STATES OF AMERICA,
Petitioner,

vs.

NELSON B. UPDIKE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NELSON B. UPDIKE, ET AL., RESPONDENTS

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No. 340, October Term, 1929

In the Supreme Court of the United States

October Term, 1929

UNITED STATES OF AMERICA,
Petitioner,

vs.

NELSON B. UPDIKE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NELSON B. UPDIKE, ET AL., RESPONDENTS

NATURE OF THE SUIT

This is a proceeding to collect a tax upon the income of Updike Grain Company, dissolved in August, 1917, from the transferees of the assets of that company, for the period January 1, 1917, to June 30, 1917, which was

assessed against the Updike Grain Company in January, 1920, upon returns filed by the Updike Grain Company in August, 1917.

QUESTIONS PRESENTED

1.

The collection of the sum sought to be recovered herein from the defendants, as transferees of the assets of the Updike Grain Company, is barred by Section 278 (d) of the Revenue Act of 1926.

2.

The collection of the sum sought to be recovered herein from the defendants, as transferees of the assets of the Updike Grain Company, is barred by Section 250 (d) of the Revenue Act of 1921 and Section 277 of the Revenue Act of 1924.

3.

If the collection of these taxes by proceedings of any kind against the taxpayer is barred by the limitations contained in any of the revenue acts, the suit cannot be maintained against the transferees as an independent suit for the recovery of trust funds.

4.

The suit against the transferees cannot be maintained in any case, because the Government is a subsequent creditor as to the transfer in August, 1917,

there being at that time no tax liability nor an existing statute under which a tax liability could arise.

5.

The provisions of the Revenue Act of October 3, 1917, are not applicable to a corporation which was lawfully dissolved under state law, after having discharged all its existing obligations and distributed all its assets among its stockholders prior to the enactment of the suit.

STATEMENT OF FACTS

While the statement contained in the Government's brief is only inaccurate, in that it is stated on page 4 that no returns were ever filed in behalf of the corporation under the Revenue Act of 1917, and on page 5 that the present suit was begun under the "trust fund" doctrine to recover "funds" received by the stockholders to the use of the United States, yet it omits portions of the record necessary to a full understanding of the issues presented by the respondents here. It is necessary, also, to restate some of the statutes attached in the appendix to the Government's brief, because they omit portions relied upon by the respondents on this appeal; and it is also necessary to add some additional sections.

The Updike Grain Company was a corporation organized under the laws of the State of Nebraska, and it was dissolved pursuant to those laws during the month of August, 1917. Prior to its dissolution it had paid all

its debts and obligations of every character, including all taxes which had accrued, or could accrue, to the Government of the United States under the existing revenue laws (R. 91, 127). As stated, it distributed in cash its capital stock amounting to $2,000,000.

Under the revenue laws of 1913 and 1916, the Updike Grain Company had selected a fiscal year as the basis of its federal taxation, and, pursuant to proper procedure, its fiscal year terminated on June 30, 1917 (R. 161). Within sixty days thereafter it filed returns, an income tax return on Form 1031 (Revised October 1916) and profits tax return on Form 1095, pursuant to the provisions of Sec. 13 (b) of the Revenue Act of 1916, fully set forth in the appendix to this brief. The income shown in those returns is the sole basis of the claim of the Government for the taxes accruing under the Act of October 3, 1917. Although the corporation remained in existence after June 30, 1917, until its dissolution in August of that year, yet it is not claimed by the Government that it transacted any business, nor is any claim made for taxes accruing after that period. Not only did the taxpayer report fully and honestly to the Government, all income received by it, and every fact, regarding the income, called for by existing regulations, (R. 107) but, by an unintentional error in calculation, it reported a greater income than it was actually taxable for, and the effect of the Government's audit was to reduce the taxable income of the taxpayer for that period (R. 113, 145).

It is true that Form 1031 (revised January, 1918) was mailed to the taxpayer, and received by its former secretary, in March, 1918. But he immediately returned it with a letter stating that the corporation was dissolved and that it had filed its return showing all the income which it had received up to the time of its dissolution, and had paid all taxes accruing to the United States Government under existing laws and regulations, and also called attention to the fact that subsequent to its dissolution it had made final and fiscal returns, showing all its income (R. 91). Thereafter no action was taken by the Bureau of Internal Revenue under Regulation 33, Article 196, in effect from January 6, 1914, to December 31, 1921, which is included in the appendix to this brief, by sending to the taxpayer a notice on Form 1045, or by making other demand for returns (R. 349).

During the month of October, 1918, an agent of the Internal Revenue Bureau examined the books and records of the Updike Grain Company for the years 1913, 1914, 1915, 1916, and 1917, to determine its tax liability for said years, and the fiscal period in 1917 ending June 30, 1917 (R. 95). When he called at the former office of the company and conferred with its former secretary he asked for copies of the returns which the company had made for the fiscal year ending June 30, 1917, and these were furnished him. (R. 350). The agent made up returns upon the forms then in effect, a corporation income tax return on Form 1031, revised January, 1918, and a corporation excess profits tax return on Form 1103 (R. 131-35). These returns were not signed, but it is significant that the agent of the Bureau, in preparing and

transmitting them, (to the commissioner), denominated them "amended returns." In his report to the Department (R. 107) the agent sends in the draft of amended returns, unsigned. When this report was transmitted by the Omaha office to the Commissioner's office in Washington, it was accompanied by a letter (R. 105) in which the agent's action is referred to as a report "of the returns of annual net income of the Updike Grain Company." In subsequent correspondence between the Omaha office and the Washington office on the subject (R. 101) this report of the Revenue Agent is referred to as "supplemental return, fiscal year ended June 30, 1917." In a letter from the Revenue Agent in Charge at Omaha to the Updike Grain Company (R. 317) and another letter of November 24th, 1919 (R. 323), and in various copies, reports, official actions and records, this return, made by the Updike Grain Company, within sixty days from the close of its fiscal year ending June 30, 1917, is referred to as the return of the corporation for the taxable period then under consideration, and all the transactions of the Government officials concerning it are treated and discussed as amendments or investigations or revisions of that return, and, finally, in January, 1920, the Commissioner of Internal Revenue assessed a tax against the Updike Grain Company for the amount now sought to be collected in this suit, and, among other entries in the Government records, stamped upon the original returns of the company made within sixty days of the end of its fiscal year, a stamp indicating the assessment, and containing in figures the amount (R. 165).

The defenses presented in the lower court were that no tax ever accrued against the Updike Grain Company, that the stockholders were not liable for the subsequent obligations of the company, if any existed, and that the suit was barred by the provisions of the revenue laws of 1921, 1924 and 1926.

SYNOPSIS OF ARGUMENT

I.

The appellees contend that this suit is barred by the provisions of Section 278 (d) of the Revenue Act of 1926 for the reason that this is a proceeding to collect a tax; the tax was assessed against the taxpayer in January, 1920; and this suit was commenced on April 2, 1927, more than seven years after the assessment. Even if no return had been filed by the taxpayer, nevertheless, a collection of the assessment is barred after the lapse of six years, because the clause in the section making it applicable to an assessment made "within the statutory period of limitation properly applicable thereto", when construed in connection with the other legislation on the subject, was obviously inserted for the protection of the taxpayer, to prevent this section from operating to authorize a suit against the taxpayer upon an assessment made after the time for making it had been barred by the provisions of any section of the revenue law. Moreover, the phrase "within the statutory period" is obviously, and in the light of the context, applicable to that indefinite period during which the Commissioner is authorized to assess a tax against a tax-

payer who has failed to file a return. Congress has included the clause "at any time", by reference, as one of the cases within which an assessment may be made, and afterwards barred. The proceedings in Congress, as appears from the report of the Conference Committee, and other proceedings there, indicate that Congress intended by this section to bar suits upon assessments, even though there had been no limitation upon the time for making an assessment. This assessment was made within a period of limitation applicable thereto, as stated in the opinion of the District Court, because at the time it was made there was a limitation of three years, that is, from March 15, 1918, to March 15, 1921, within which it was necessary for the Commissioner to discover the deficiency and thereafter make the assessment. The discovery in this case was made within three years and the assessment which followed was, therefore, within a statutory period applicable to it. This was the construction placed upon this section by the Internal Revenue Bureau during its enactment, and afterwards, until a short time before the commencement of this suit. In numerous hearings before the Board of Tax Appeals, and in decisions of the district and circuit courts, including the decision appealed from here, this has been the uniform construction placed upon this section.

The attempted application by the Government of the "trust fund theory" to this case, will not authorize the prosecution of the suit, if it is determined by the court that a suit against the taxpayer would have been barred by the provisions of Sec. 278 (d) of the Revenue Act of 1926, or by any earlier provisions of the revenue

laws; for the reason that the trust fund theory, in the form propounded by the Government in its argument, has been expressly repudiated by this court in *Graham vs. Railroad Co.*, 102 U. S. 148; *Fogg v. Blair*, 133 U. S. 534; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371; *McDonald v. Williams*, 174 U. S. 397; *Pierce v. United States*, 255 U. S. 398, and by state decisions in *Shaw v. Robinson & Stokes*, 50 Neb. 403; *Coleman v. Hagey*, 252 Mo. 102; *Leudecke v. Des Moines Co.*, 140 Ia. 223, and *Hospes v. N. W. Mfg. Co.*, 48 Minn. 174, as well as in numerous other decisions. It does not apply to this case in any event, because the primary question here is not the application of a statute of limitations to the suit against the transferees, but to the absence, in the plaintiff's case, of a fundamental prerequisite for the prosecution of a suit against the transferee, to-wit, the existence of a present enforceable claim against the transferor. But, in any case, a suit against the transferee is a proceeding in court for the collection of a tax within the meaning of Sec. 278 (d), as appears from the Government's petition in this case (R. 8), even after it had been amended for the purpose of converting it into a general equity suit (R. 12-155, 6, 7-160), because it is based upon the averment that the tax accrued against the taxpayer, and that the property in the hands of the transferees is liable to the payment of that tax, and the prayer is that the amount of the tax be recovered. As such a suit is, in its essence, a creditor's bill, it is ancillary to the claim upon which it is based, and a part of the proceedings for the collection of the tax. A creditor's bill has been called an equitable execution, and whether it is invoked in aid of the collection of a judgment at law,

where execution fails, or in aid of the collection of a tax against the transferor, if such a suit is permissible without a judgment at law, it remains essentially an ancillary proceeding, which, in no case, can rise higher than its source, or be enforceable after the claim upon which it is founded ceases to be enforceable against the transferor. *Merchants Nat. Bk. vs. McDonald,* 63 Neb. 363; *Pierce vs. United States,* 255 U. S. 398; *Dole vs. Wilson,* 39 Minn. 330; *Flagg vs. Flagg,* 39 Neb. 229; *Holmes v. Webster,* 98 Neb. 105; *Fisher v. Woodard,* 103 Neb. 253; *Newell v. Dart,* 28 Minn. 243; *Scott v. Neely,* 140 U. S. 106; *Bank v. Braithwaite,* 7 N. Dak. 352; *McAleer v. Clay Co.,* 42 Fed. 665; *Board v. Tome,* 153 Fed. 81; *Gen. Elec. v. Hurd,* 171 Fed. 984; *Mullen v. Hewitt,* 103 Mo. 639.

But the appellees contend that this is not a no return case, and urge that the right to collect this tax became barred by the provisions of Section 277 of the Revenue Act of 1926. Under the statutes as they existed in 1917 and 1918, the only law requiring a return from a corporate taxpayer having a fiscal year, was found in Section 13 (b) of the Revenue Act of 1916, which provided that such corporations should file their returns within sixty days after the close of their fiscal year, and, by the provisions of Section 4 of the Revenue Act of 1917, which provided that the increased income tax authorized by that act should be computed, assessed and collected upon the same incomes, and in the same manner as the taxes imposed by the Act of 1916, and by Section 212 of the Excess Profits Tax of 1917, it was provided that all provisions of the 1916 law relative to returns,

were made applicable to the tax imposed by the new act. Under these statutes the appellees contend that the filing of their returns within sixty days of June 30, 1917, was a compliance, not only with the 1916 Act then existing, but also fulfilled the provisions of the Act of October 3, 1917, which merely adopted the 1916 law relating to returns, and neither the revenue acts, nor any distinct and unambiguous provision found in the Treasury Regulations, required a corporation which had reported its income within the statutory period, to file new and independent returns after the passage of the Act of October 3, 1917.

But whether the returns so filed constituted such compliance with the law, in and of themselves, as to constitute the basis for the running of the statute of limitations found in the 1921 Act, and in the 1926 Act, yet the conduct of the Government officials with reference to returns, by which they were accepted and treated as the returns required by the Act of October 3, 1917, and were audited as such, and the assessment of January, 1920, was made upon those returns, after the Government had audited them and found them correct, and by treating these returns as the statutory returns upon which the limitation was based, until the first of those series of cases was pending in court. The point here is that the Government, having from the very beginning treated this return as the statutory return, and at no time required the taxpayer to file any other return or requested any other than an amendment to this return, the Government ought not now be permitted to change

front for the purpose of evading the subsequent statute of limitations.

No claim is made against the respondents solely because they are stockholders of the corporate taxpayer, it is not claimed that there is any statute of the State of Nebraska, where the corporation is organized, that makes them liable, and there is no statute of the United States which makes them liable as stockholders, or as transferees of the corporate assets; not even Sec. 280 attempts either to create or enlarge the liability of transferees of assets, but merely regulates a procedure for enforcing by summary process whatever existing liability there may be at law or equity. Necessarily, therefore, whatever liability exists is that which grows out of the laws of Nebraska, including such general rules of law as are construed and defined in the courts of the United States with reference to transactions arising under the laws of the State of Nebraska. The liability to creditors growing out of the transfer of assets of a corporation to its stockholders is, in a proceeding of this character, precisely the same as the liability of the transferee of assets of an individual. (*Graham v. Railroad Co.*, 102 U. S. 148; *Hollins v. Brierfield*, 150 U. S. 371; *Pierce v. United States*, 255 U. S. 398). It is only when a court of equity has taken over the liquidation of a corporation, that there is any trust which differs from the status of the transferred assets of an individual debtor and the claims of the creditors. In each case the right of the creditor to pursue the assets is a remedy granted to the creditor because of the inadequacy of legal remedies, either because a judgment at law and the failure of execution

has demonstrated the insufficiency of the legal remedies, or because a court of equity, in administering the remedy directly, without a prior judgment at law, has become satisfied that there is no remedy in the proceedings at law, and that the remedies in equity are therefore available. But it is universally held in the decisions defining and enforcing this equitable remedy, that it is available only to a creditor existing at the time of the transfer. This is true whether the transfer was fraudulent as against existing creditors, or whether it was only voluntary, and therefore capable of being set aside by existing creditors. But in no case is the remedy available to a subsequent creditor, unless, in some jurisdictions he can allege and prove that the transfer was made in contemplation of a debt to be contracted and was intended as a fraud upon such creditor. In this case there is no allegation of any intention on the part of the corporation or its stockholders to defraud the Government by distributing its assets and dissolving in August, 1917, but, on the contrary, the averment is that the dissolution was "duly" made (R. 9), that the resolution of the stockholders providing for dissolution of the corporation and the transfer of its assets was "duly" adopted by the stockholders, and that thereafter (R. 10) legal steps to complete the dissolution were "duly" taken. Of course, the meaning of the word "duly" is that the steps were lawfully taken, (Century Dictionary, Standard Dictionary, 19 C. J. 833, *State Bank v. Morse*, 60 Kas. 526; *Robertson, Col. v. Perkins*, 129 U. S. 333) and it is no where alleged that they were taken unlawfully and for the purpose of defrauding the Government, nor is there any proof whatever to that effect. The averment in the Government's

petition that the action of the corporation was "duly" taken, applies as well to the resolution directing the distribution of the assets among the stockholders, as to the technical steps relating to the dissolution itself.

The right to pursue the assets of a debtor to satisfy the claims of a creditor, as distinguished from the procedure, is based upon Statute 13, Eliz. c5, and the various statutes of the states re-enacting that statute, with modifications or enlargements. (*Sexton v. Wheaton,* 8 Wheat. 229, *Mattingly v. Nye,* 8 Wall. 370; *Graham v. Railroad Co.,* 102 U. S. 148; *Hollins v. Brierfield,* 150 U. S. 371; *Shaw v. Robinson & Stokes,* 50 Neb. 403; *Hospes v. N. W. Mfg. Co.,* 48 Minn. 174). And under these decisions, the right of the creditor is grounded upon the statute, and applies alike to the creditors of an individual and the creditors of a corporation.

If the action against the taxpayer was barred by Sec. 278 (d) of the Revnue Act of 1926, then the Government cannot succeed in this proceeding, because it lacks an essential element in its case, that is, a debt existing at the time of the suit, and whether barred by that section or not, the Government cannot recover against the stockholders, because it is a subsequent creditor, and not in a position to attack a transfer completed before the Government's claim was even authorized by a statute.

While it is true that the decisions of various district courts and circuit courts of appeal are to the effect that a corporation lawfully, that is "duly," dissolved in 1917, prior to the passage of the act of October 3, 1917, is liable to the increased tax imposed by that act, yet this court has no where so decided, and its refusal

to grant a certiorari in the first case of *Updike v. United States,* 8 Fed. (2nd) 913, 271 U. S. 661, does not imply any approval by this court of the decisions of the district or circuit court in that case, and certainly not in any of the other cases which did not reach this court. (*United States vs. Carver,* 260 U. S. 482).

In accordance with the first ruling made by the Commissioner of Internal Revenue in October, 1917, after the passage of the act (R. 187), the stockholders of the Updike Grain Company have contended that the act of October 3, 1917, was not applicable to a corporation which was dissolved before the act was passed, because, whether it was in the power of Congress or not, no intention was shown in that act to revive a dissolved corporation for the purpose of taxing it. By the final section of the act, 40 Statutes at Large, 338, §1302 it was provided that, unless as otherwise provided in the act, it should take effect and be in force on the day after its passage, and as it was passed on October 3 ,1917, it took effect and became in force on October 4, 1917. So far as affects this controversy, the only feature of the act which could be called retroactive, are the provisions of Sections 4 and 200 of the act, (40 St. at L. 302) to the effect that the first taxable year under the act should be the year 1917, and that for corporations having a fiscal year, the first taxable year should be the fiscal year ending during 1917. That Congress thereby declared an intention of applying the terms of the act to all incomes during any part of the calendar year 1917, is conceded, but the contention of the stockholders at all times has been that the statute no where evinced an intention of taxing cor-

porations which have passed out of existence, nor the transferees or stockholders of such corporations, conceding to the fullest extent the power of Congress to do so, if it had indicated its intention to take such action. The income tax is a personal tax; it is in no sense a levy upon specific property. All the provisions of the law indicate that it creates a personal liability on the part of persons and corporations, and its failure to specify that its terms are applicable to the stockholders of dissolved corporations, under the familiar rule that a tax statute will not be extended by implication, means that a tax was not assessable on account of income received by a defunct corporation. *Smietanka v. Trust & Savings Bank,* 257 U. S. 602; *Schwab v. Doyle,* 258 U. S. 529; *Union Trust Co. v. Wardell,* 258 U. S. 537; *Gould v. Gould,* 245 U. S. 151, *Anderson v. Railway Co.,* 216 Fed. 83 (C. C. A. 2d Circuit), (Excise Tax of 1909); *Scott v. Railway Co.,* 246 Fed. 545 (C. C. A. 9th Circuit); *Pa. Steel Co. v. Railway Co.,* 198 Fed. 774 (C. C. A. 2d Circuit).

ARGUMENT

I.

Was the collection of the sum sought to be recovered herein from the defendants, as transferees of the assets of Updike Grain Company, barred by section 278 (d) of the Revenue Act of 1926 at the time this action was begun?

The Government's brief contains two reasons for contending that Section 278 (d) does not bar this suit, which may be summarized as follows:

1. Because this is not a proceeding to collect taxes.
2. Because the taxpayer filed no return, in which case the tax could have been assessed "at any time", which is not a "statutory period of limitation properly applicable thereto."

We will discuss these two contentions under numerals 1 and 2.

1.

This contention is sought to be supported with three reasons which we shall discuss under letters (a), (b) and (c), with headings as summarized in the Government's brief, pp. 7 and 8.

(a).

> "That Congress intended Section 278 (d) of the Revenue Act of 1926 to be so restricted is indicated by the fact that in Section 280, authorizing the Commissioner to notify transferees of corporate assets of deficiencies in a tax against the corporation, and giving them the right of appeal to the Board of Tax Appeals, specific statutes of limitation were enacted." (p. 7, Gov. brief).

The applicable part of Section 278 (d) to this argument is as follows:

> "Where the assessment of income, excess profits, or war profits tax imposed * * * by prior act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax."

The following concessions are made by the petitioner in its brief or are undisputed in the record:

1. That the amount sought to be recovered herein represents income, excess profits and war profits taxes imposed by a prior Act of Congress, to-wit: The Revenue Act of 1917. (Gov. Brief, 4).

2. That the taxes were assessed against the taxpayer before the enactment of the Revenue Act of 1926. (Gov. Brief, 4).

3. That the taxes were assessed in January, 1920. (Gov. Brief, 4).

4. That this suit was begun April 2, 1927, more than six years after the assessment of the taxes was made. (Gov. Brief, 5).

5. That no other suit or proceedings has been begun against the taxpayer, the stockholders or any one else, for collection of the taxes. (Gov. Brief, 5).

6. There were no waivers or consents by the taxpayer or any one else, extending the time for assessment or collection of the taxes.

If this is a proceeding to collect taxes this case comes squarely within the terms of the above section.

It is also apparent that the right to proceed against the taxpayer for the taxes involved became barred by this section in January, 1926. and if the Government had proceeded against the respondents under Sec. 280, that right became barred in January, 1927, more than two months before this proceeding was begun; also that the right to proceed against the taxpayer having become barred before the enactment of the Revenue Act of 1926, the liability for the tax was extinguished by Sec. 1106 Revenue Act of 1926.

The Government seeks to avoid the application of Section 278 (d) under this subdivision of its argument by the contention that although its terms are broad enough to bar this suit, and do not limit its application to proceedings against the taxpayer only, Congress by enacting "specific statutes of limitation" in Section 280, of the same Revenue Act, indicated an intention to restrict the application of Section 278 (d) to proceedings against the taxpayer only.

Bearing in mind that this is a proceeding to "collect" and not to "assess", and that Section 278 (d) deals solely with the right to "collect", it is, therefore, necessary for us to ascertain (1) if Congress did in fact restrict the effect of Section 278 (d) by any "specific stat-

utes of limitation" in Section 280, and (2) the intention of Congress.

Section 280 deals with limitations upon both the right to "*collect*" a tax from, and the right to "*assess*" a tax against, a transferee, but it deals with the right to "*collect*", only in the general terms of Paragraph (a) thereof, wherein the general limitation statutes of the Revenue Acts were made applicable, to proceedings thereunder against transferees, by the use of the following language:

> "The amounts * * * shall except as hereinafter in this Section provided, be assessed, *collected,* and paid in the same manner and subject to the same provisions and *limitations* as in the case of a deficiency in a tax imposed by this title (* * * including * * the provisions authorizing distraint and proceedings in court *for collection*). (Our italics).

Note the phrase "except as hereinafter in this Section provided." Thereinafter there was no provision otherwise limiting the time "*for collection*", but there were specific provisions changing the time for "*assessments,*" which simply extended "the period of limitation for *assessment* of any such liability" to "within one year after the expiration of the period for *assessment* against the taxpayer", or if an assessment had been made against the taxpayer before the time for assessing him had expired, to any time within six years after the assessment, but in no case later than one year after the enactment of the 1926 Act, to-wit: February 26, 1926. (Sec. 280 (b) (1) (2), Rev. Act of 1926).

It must be quite clear from an analysis of Section 280 that Congress expressly made proceedings thereunder both to collect and assess subject to limitation statutes contained in other sections of the Act and particularly in Section 278 (d). If this conclusion admits of any doubt, the intention of Congress in that respect is made plain at pp. 43 and 44 of the Conference Report to the House of Representatives on the Revenue Bill of 1926, dated February 22, 1926, wherein, in discussing the purport of Section 280, it is stated:

> "Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts. Such a proceeding is in lieu of the present equity proceeding and is exclusive, save that, of course, in a proper case, a tax lien upon the assets arising prior to their transfer may be enforced against the transferee by distraint, or in case of real estate by a proceeding in equity. In the case where the taxpayer remains in existence after the transfer, an unsatisfied return of a distraint warrant, issued in pursuance of an assessment lawfully made after a deficiency letter has been mailed to the taxpayer, would suffice in lieu of an unsatisfied execution to establish the liability of the taxpayer.
>
> "In view of the above situation it will be seen that the amendment makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes. The amendment thereby substitutes the specialized and more expeditious procedure of the board for

that of the district courts in equity and will develop through the board a uniformity of precedents in lieu of the present rather vague principles of law governing the liability of a transferee for unpaid taxes of a transferor.

* * * * *

"Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets.

* * * * *

"*The statute of limitations as to collection is covered by the incorporation by reference of section* 278 (d). (Our italics)

The last sentence is significant inasmuch as Section 278 (d) was not specifically mentioned in Section 280.

The Bill as reported by the Conference Committee was enacted into law February 26, 1926. Thereafter the procedure outlined in Section 280 was almost universally adopted by the Commissioner in all proceedings for collection of taxes from transferees.

Prior to the passage of the 1926 Act it was the uniform holding of the courts that when a claim under the trust fund theory became barred against the transferor, it thereupon and thereby became unenforcible against the transferee (see cases infra) and this general rule had been applied to claims for income taxes.

In *United States vs. Lazenby,* 5 Fed. (2d) 827, (D. C. N. D. Texas), decided June 3, 1925, being an action by the Government against transferees of the assets of a dissolved corporation to recover income taxes of a dissolved corporation for the year 1918, the court said:

"That the instant suit is not against the original taxpayer, but is at equity against a person who received all of the assets of the taxpayer, must not prevent a reasonable view of the statute of repose which Congress evidently intended. The language of the statute is that 'no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.' Certainly there can be no other object in the present suit. It is for the collection of a tax. While I do not think that a narrow construction of the statute should be made, I am of the opinion that the first two criticisms of the motion to dismiss are well taken."

Congress indicated its understanding of this rule and expressly provided in Section 280 (a) that it should apply to proceedings to collect taxes from transferees, and modified it only with respect to proceedings to assess the liability for taxes against a transferee. In the fall of 1926 this point was raised by the respondents herein in a hearing, as to their liability for the taxes herein involved, had before representatives of the office of the General Counsel of the Bureau of Internal Revenue, and on Dcember 7, 1926, D. H. Blair, Commissioner of Internal Revenue wrote to the attorney for Mr. Updike, as follows:

"Receipt is acknowledged of your letter addressed to the General Counsel under date of November 20, 1926, concerning the matter of the income tax liability of the Updike Grain Company.

"It has been decided that no steps will be taken to assess against Mr. Updike any liability of the Updike Grain Company as provided in Section 280 of the Revenue Act of 1926." (R. 44).

On December 31, 1926, C. R. Nash, Assistant to the Commissioner, in a letter to the Collector of Internal Revenue, Omaha, Nebraska, after referring to the tax sought to be collected herein, said:

> "This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53." (R. 291).

Thereafter A. W. Gregg, General Counsel of the Bureau of Internal Revenue, in G. C. M. 1029, Cum. Bull. VI-2, 95, promulgated on January 10, 1927, an opinion for the guidance of collectors, revenue agents and other employees of the Treasury Department, reaffirming this settled rule, wherein, in construing Section 280, he said:

> "The statute is silent as to whether a transferee may be assessed where the period of limitation for assessment against the taxpayer expired prior to the enactment of the Revenue Act of 1926 without any assessment against such taxpayer having been made or without any proceeding in court against him having been begun.
>
> * * * * *
>
> "Was it intended by Congress that Section 280 should have a retroactive application? That is, was it the purpose of Congress in enacting the Revenue Act of 1926 to make effective, as against a transferee, a tax liability which could not be asserted under the law against the transferor taxpayer because of the bar of the statute of limitation? (See section 278 (e), Revenue Act of 1926.)
>
> "There is nothing in the section itself, or in any portion of the Revenue Act of 1926, or in the legis-

lative history of the Act, which indicates that Congress intended that any liability of the taxpayer which could not be asserted should be made effective by the provisions of section 280 against the transferee of the taxpayer's property.

* * * * *

"Prior to the enactment of the Revenue Act of 1926 there was no statutory authority for assessing transferees of taxpayers' property to satisfy taxes due or found to be due to the United States. True it is that in some instances the amount of taxes was recoverable by suit from transferees where the facts showed they were proper parties to the proceedings by reason of the application of the trust-fund doctrine, but there was no existing statute which gave the right to assess against a transferee amounts due the United States as taxes for which his transferor was primarily and immediately liable. Such right was given for the first time by Section 280 of the Revenue Act of 1926. Under that section the transferees' liability is no greater nor more comprehensive than that of the transferor taxpayer. The section merely prescribes a method for the enforcement of an established liability and adopts, for this purpose, the method of assessment applicable to the collection of taxes in the ordinary case. *The logical conclusion is that it was not the purpose of Congress to make effective against a transferee a tax liability which at the time of the enactment of the Revenue Act of* 1926 *could not be asserted against the transferor taxpayer because of the bar of the Statute of Limitations.* (Our italics)

The Board of Tax Appeals in numerous cases, expressly acquiesced in by the Commissioner of Internal Revenue, made the same ruling.

The Joint Committee on Internal Revenue Taxation, established under Section 1203 of the Revenue Act of

1926, in their report dated November 15, 1927, and with knowledge of these rulings, made no recommendation to change what had become the settled practice of the Treasury Department and the Bureau of Internal Revenue, particularly, because on p. 67, in referring to the effect of Section 280 upon transferees, they said:

> "In substance it subjects him to the same proceedings as though he were the taxpayer",

and on p. 68 said:

> "At present no change is recommended as to limitation proceedings."

The General Counsel of the Bureau of Internal Revenue thereafter continued to adhere to this rule.

In an opinion by Mr. C. M. Charest, General Counsel, promulgated August 13, 1928, in G. C. M. 4554. Cum. Bull. VII-2, 86 he said:

> "An opinion is requested as to whether the amount of the liability of a transferee based on the tax due from the M Company for the period January 1, to February 28, 1918, which was paid by the transferee, the O Company may be credited or refunded to the latter company.
>
> "The liability involved in this case was assessed against the O Company as transferee of the assets of the M Company, under the provisions of Section 280 of the Revenue Act of 1926, but the assessment was made after the expiration of the statutory period applicable thereto. The O Company paid the amount of the assessment and immediately thereafter filed a claim for refund of the amount so paid.
>
> * * *

"It appears unnecessary in the consideration of the question to refer to the decision of the Supreme Court of the United States in the case of *Bowers vs. New York & Albany Lighterage Co.*, since the proposition of crediting or refunding the amount of tax assessed or paid after the expiration of the statutory period is now governed by Section 607 of the Revenue Act of 1928, which provides as follows:

> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

"Under the provisions of section 280 of the Revenue Act of 1926 and section 311 of the Revenue Act of 1928, the assessment, collection, and payment of the liability, at law or in equity, of a transferee of the property of a taxpayer are subject to the same provisions and limitations as if a deficiency in tax were involved, except with respect to the period during which an assessment may be made.

"Since the liability involved in the instant case was assessed after the expiration of the statutory period properly applicable thereto, the amount paid in respect to the assessment must be regarded as an overpayment. A claim for refund of such overpayment having been filed within the statutory period, the amount of the overpayment must be credited or refunded."

It will be noted that the General Counsel, accorded to the transferee the rights granted in Section 607, quoted above, although such rights by that section only related to *"any tax"* and were only given to the *"taxpayer."*

The Board of Tax Appeals has continuously adhered to the same rule.

Spencer vs. Commissioner, 11 B. T. A. 437, decided April 9, 1928, acquiesced in by Commissioner, Int. Rev. Bul. VII-31-3828.

Hammersly vs. Commissioner, 16 B. T. A. 68, decided April 18, 1929, acquiesced in by Commissioner, Int. Rev. Bul. VIII-29-4274.

Wheeler vs. Commissioner, 16 B. T. A. 96, decided April 22, 1929, acquiesced in by Commissioner, Int. Rev. Bul. VIII-31-4290.

Hynes vs. Commissioner, 16 B. T. A. 1272, decided June 29, 1929 approving and following opinion of Circuit Court of Appeals in this case.

In the Government's brief, page 19, it is said that Bureau rulings and Board decisions are not in point because they were made with reference to proceedings against transferees under Section 280, but in that the Government is in error because in G. C. M. 1029, supra, and in *Spencer vs. Commissioner,* it was held that Section 280 is silent as to whether a transferee may be assessed where the period of limitation for assessment against the taxpayer expired prior to the enactment of the Revenue Act of 1926, without any assessment against the taxpayer having been made or without a proceeding in court against him having been begun, and consequently under those circumstances they applied the general rule that where the right to assess the tax against the transferor had become barred prior to the enactment of the Revenue Act of 1926, the right to enforce a liability for such tax against the transferee had thereby become unenforcible.

The courts have continued to adhere to the same rule.

United States vs. Snook, 24 Fed. (2d) 844, decided March 5, 1928.

United States vs. Armstrong, 26 Fed. (2d) 227, decided April, 1928.

The Committees of Congress having in charge the formulation of Revenue legislation, continued to recognize the application of Section 278 (d) to transferees and fiduciaries. The limitation provisions in Section 280 were exactly the same as to fidicuiaries of an estate as they were to transferees generally. Consequently, if the provisions of Section 278 (d) were available to fiduciaries upon claims for taxes owing by a deceased, they were likewise available to transferees of the assets of a dissolved corporation. Both in the report of the Committee on Ways and Means of the House of Representatives on the Revenue Act of 1928, dated December 7, 1927, p. 24, and of the Committee on Finance of the Senate on the same act, dated May 1, 1928, p. 32, those committees plainly indicated their understanding and intention that the six year period for collection of such taxes after assessment contained in Section 278 (d) should apply, by the use of the following language, in discussing the effect of Section 280 of the Revenue Act of 1926:

> "Under existing law the Government has six years within which to collect income taxes asssessed against the estate of a decedent and accruing during the lifetime of a decedent, or during the administration of his estate."

As section 278 (d) was the only section which limited the right to collect such taxes to six years, the committees were necessarily referring to that section.

The Revenue Act of 1928 was passed May 29, 1928, and although Section 280 (d) of the Revenue Act of 1926 was amended in some respects (Section 505, Revenue Act of 1928) and an identical section, as amended, was inserted in the new law (Section 311, Revenue Act of 1928) to govern cases arising thereunder, Congress inserted no provisions (in the new Section), or amendments to the old Section indicating any disagreement with the rulings and holdings, supra.

On the contrary, Congress in many instances in the 1928 Act indicated that it understood that all of the provisions relating to limitations, refunds, appeals and many other proceedings available to the taxpayer, wherein the right was specifically given to the "taxpayer" only, were, by the general provisions of Sections 280 (a), quoted above, made, by reference, available to the transferee of the assets of a taxpayer, as well as to the fiduciary of an estate.

In Section 280, Revenue Act of 1926, the specific extension of one year for assessment against a transferee, after the time for assessing the transferor had expired, did not apply to a transferee of a transferee, consequently he might avail himself of the settled and accepted and accepted rulings and holdings that the right to assess a liability for the tax was barred when the right to assess the taxpayer was barred, although the period of limitation against the preceding transferee extended one year beyond the period applicable to the taxpayer. To deny him

this greater benefit the 1928 Act extended the time for assessing him one year beyond the time for assessing the "preceding transferee." (Sec. 311 (b) (2), Rev. Act 1928).

In the enactment of Section 280 in the 1926 Act, Congress intended the procedure outlined in Section 274, respecting the collection of deficiencies against taxpayers generally—which provided for notice to the taxpayer of an intention to assess, with a right within sixty days to appeal to the Board of Tax Appeals—to be exclusive for assessing and collecting the liability of a transferee. (Section 280 (a) and Section 274, Revenue Act 1926). (Report of Committee on Ways and Means to the House of Representatives, dated December 7, 1925, p. 10) (Report of Committee on Finance of the Senate, dated January 16, 1926 —calendar date January 22, 1926—pp. 28, 29 and 30).

(Conference Report to the House of Representatives, dated February 22, 1926, pp. 39, 43 and 44). (Report of Joint Committee on Internal Revenue Taxes, supra, p. 15). (Report of the Committee on Finance of the Senate, dated May 1, 1928, pp. 39 and 40).

As a result numerous proceedings were begun against transferees under Sections 280 and 274, Revenue Act of 1926, which found their way into the Board of Tax Appeals, instead of into the courts. Between the time of the enactment of the Revenue Act of 1926 and the Revenue Act of 1928, the constitutionality of Section 280 was challenged and the section was held unconstitutional in the case of *Owensboro Ditcher & Grader Co. vs. Lucas,* 18 Fed. (2d) 798. Fearing that the Section might ultimately

be held unconstitutional, and that therefore the proceedings begun thereunder would be a nullity and not operate to toll the general statutes of limitations, which were running against the transferees in the cases pending before the Board of Tax Appeals, Section 505, Revenue Act of 1928, was enacted in the hope of thereby suspending the general statutes of limitations against transferees "(* * * if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final) and for sixty days thereafter."

It is suggested on p. 14 of the Government's brief that by the enactment of Section 604, Revenue Act of 1928, prohibiting suits to restrain the enforcement of the liabilities of transferees under Section 280, Congress indicated an intention to treat the liability of transferees as distinct from the liability of taxpayers, because that action was not necessary if Section 3224 R. S. (U. S. C., Title 26, Section 154), prohibiting the maintenance of a suit for the purpose of restraining the assessment or collection of any tax, was applicable. The facts are that the Department of Justice and Bureau of Internal Revenue had consistently taken the position in numerous court cases that proceedings against transferees were proceedings to collect taxes and that while the transferees were making the contrary contention Section 3224 was applicable.

Owensboro Ditcher & Grader Co. vs. Lucas, 18 F. (2d) 798 (D. C. W. D. Ky.).

Ralston vs. Heiner, Coll., 24 F. (2d) 416 (C. C. A. Pa.).

Felland vs. Wilkinson, 33 F. (2d) 961 (D. C. W. D. Wisc.)

Trinacia Real Estate Co. vs. Clarke, 34 F. (2d) 325 (D. C. N. D. N. Y.).

Mid-Continent Petroleum Corp. vs. Alexander, 35 F. (2d) 43 (D. C. W. D. Okla.).

To settle this controversy by statute, instead of awaiting an opinion of a court of last resort, Congress passed Section 604. When you know what prompted the passage of this Section, it is quite apparent that the inference sought to be drawn by the Government is not justifiable.

In the case of *Felland vs. Wilkinson*, supra, the court used this significant language:

* * *

"It must be borne in mind that while the liability of a transferee may not be a tax liability in the ordinary sense, nevertheless it is a liability for a tax; in other words, the government is seeking to collect what is primarily a tax and continues to be a tax although, because of the inability to collect from the taxpayer proper, it seeks to require his transferee to pay. From the standpoint of the government the money sought in this case is as much an item of revenue as it would be were the proceedings to collect directed toward the Stoughton Lumber Association. * * *

"In this view, it seems that section 604 may and should be given effect according to its terms in the same manner as has section 3224, as a part of the 'system of corrective justice, intended to be complete,' placing the transferee in the same category as a taxpayer in so far as he is required to first pay the tax liability and thereafter seek recovery back."

In the case of *Routzahn vs. Tyroler*, 36 F. (2d) 208 (6th CCA) the Department of Justice and the attorneys for the Bureau of Internal Revenue again took the position that a transferee was a "taxpayer," within the mean-

ing of that "term," as used in Section 1001, Revenue Act of 1926, and Section 1224, Title 26, U. S. C. A., where the right of review of a decision of the Board of Tax Appeals was expressly given only to the "taxpayer", and induced the court to so hold.

The facts in the *Trinacia Real Estate Co. vs. Clarke* case, supra, show that the Bureau of Internal Revenue has in other respects recognized that proceedings against a transferee is a "proceeding to collect a tax," by making jeopardy assessments against a transferee under Section 279, Revenue Act of 1926, which section contains no reference to transferees, but only grants the right to the Commissioner to make jeopardy assessments against the "taxpayer." It further appears from the facts of this case that in the very notices which the Commissioner of Internal Revenue sends out to transferees, in proceedings under Sections 280 and 274, the Commissioner recognizes that such proceedings are for the collection of *"a tax,"* because in the notice sent out therein, which we assume is the standard form, the Commissioner says:

> "In accordance with the provisions of Section 279 (a) of the Revenue Act of 1926, there has been assessed against you income tax, penalty and interest, amounting to $16,502.66, for the taxable years 1920 to 1926, inclusive, as transferee of the assets of Joseph Falcone * * *. As provided in Section 280 of the Revenue Act of 1926, there has been assessed against you the amount of $16,502.66 in taxes,

penalties and interest, constituting your liability as a transferee of the assets of Joseph Falcone * * * for unpaid income taxes, penalties and interest, in the amount of $16,502.66 assessed against Joseph Falcone * * *."

In view of the foregoing, the following rules, announced by this court in *United States vs. Jackson,* (Dec. 5, 1929), as summarized in the syllabus, become pertinent:

"Great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

"The silence of Congress in the face of a long-continued practice of an executive department involving the construction of a Federal statute must be considered as equivalent to consent to continue the practice."

See also *Brewster vs. Gage,* (Jan. 6th, 1930) wherein the holding is stated in the syllabus, as follows:

"The practical interpretatiton of an ambiguous or doubtful statute that has been acted upon by officials charged with its administratiton will not be disturbed except for weighty reasons.

"The substantial re-enactment in later income tax statutes of a provision theretofore construed by a regulation of the Treasury Department is persuasive evidence of legislative approval of the regulation."

(b).

"If the general statutes of limitation in the Revenue Act of 1926 do not apply to proceedings under Section 280, they should not apply to this proceeding which was not brought under the Revenue Act but was instituted under general equitable principles." (pp. 7, 8, Gov. Brief).

The Government admits that the general statutes of limitation respecting assessments, plus one year, apply to transferees in proceedings under Section 280, and it must be clear that the general statutes of limitation respecting collection are applicable in such proceedings. Using the Government's own argument, we say that if Congress has limited the time within which the Government may proceed against a transferee under Section 280, it is unreasonable to suppose that Congress intended that the Commissioner, by electing to proceed against a transferee in equity, instead of under 280, could thereby deny to him the benefit of the limitation provisions in Section 280, as well as all other limitation provisions, and forever hold against him the claim for taxes.

(c).

The appellees meet the contention of the Government that the so-called trust fund theory enables the Government to treat this proceeding as an independent suit, not to collect taxes, but to recover a trust fund, by the counter contention that this is a proceeding to collect taxes, that it is not an independent suit, that it is ancillary and in the nature of an equitable execution, and entirely dependent upon the continued existence of the original claim as a basis for its maintenance.

Under this heading the Government develops its "trust fund theory," and makes the contention that the

limitations in the revenue acts apply only to taxes "*qua* taxes," and not to assets in equity to recover "trust funds."

To this we make answer that a suit in equity to pursue the assets of a corporation into the hands of its transferees, is an equitable execution and is, therefore, a proceeding "for the collection of taxes," just as this court held in *Bowers v. Lighterage Co.*, 276 U. S. 346, that a "distraint" was a proceeding for the collection of a tax under Section 250 (d) of the Revenue Act of 1921, where the language was "proceeding for the collection of the tax," the word "court" not yet having been inserted in that section. If, under the 1921 Act, distraint by the Collector is a "proceeding" for the collection of a tax, and barred by the provisions of a section which does not place a limitation upon the distraint, then, obviously, by the same reasoning, a creditor's bill against transferees in aid of the collection of a tax, is a "proceeding in court for the collection of a tax" under Section 278 (d) of the Act of 1926, since both processes, that is, the distraint upon the assessment, and a creditor's bill to pursue assets into the hands of a transferee, serve precisely the same purpose.

Russell v. United States, 278 U. S. 181, which the Government brings into its brief and attempts to parry, was a suit against transferees for the enforcement of the claim of the Government for taxes against the transferor. There was no other question in the case, except whether the action was barred by the limitations contained in Section 278 (d) of the Revenue Act of 1924, which, so far as this question is concerned, does not dif-

fer from similar provisions in the section of the 1928 Act, although that later act contains other clauses making it clearly retroactive, whereas, the 1924 Act is held not to be retroactive. But in applying the 1924 Act to the claim in that case, the court throughout assumes that if there is a limitation against the taxpayer, there is also a limitation against the transferee, and the transferee is there given the benefit of the limitations contained in the section. The contention of the Government now is that the case is not in point, because attention was not called to what is now termed the "trust fund theory." Apparently, the Government was not, at the time of the presentation of that case, so greatly impressed with the trust fund theory as its representatives are now, although it is to be noted that when the Russell case was argued to this court on November 22, 1928, this Updike case had been heard and decided in the district court, and the appeal of the Government had been taken to the circuit court of appeals, and was there pending.

The Government also contends that the decision of this court in the case of *United States vs. Barth*, 279 U. S. 370, is in point. But we submit that a decision that a suit upon the bond given by the taxpayer and a surety was, in its very essence, a suit upon a contract. Surely there is a distinction between a suit upon a new and independent contract, no matter what the obligation which furnished the consideration for it, and a suit upon the original claim. But, as we shall see, the suit of the Government in this case is not upon any new promise, but upon the original claim itself.

The liability at law or in equity of a transferee of the property of a debtor terminates when the right to collect from the debtor is barred or extinguished.

As a means of avoiding the effect of the limitations contained in Sec. 278 (d) of the Revenue Act of 1926, as well as of any other limitations in prior acts, which may be applicable to this claim, the Government contends that its suit is a proceeding to distribute trust funds among the beneficiaries of a trust, and a separate and distinct suit from the suit against the taxpayer, and, therefore, not governed by the limitation in that section, and without any limitations, since there must be a specific provision found in the Federal statute to limit suits by the Government.

In the statement of the questions presented on p. 2 of the Government's brief, this proceeding is referred to as a suit in quity, brought under the trust fund theory against the stockholders of a dissolved corporate taxpayer "for money received to the use and benefit of the United States."

In its essence, this suit is a creditor's bill, that is, a suit brought by a creditor against the transferees of the assets of a debtor, to collect from the transferee, not as a liability of the transferee, but simply by pursuing property into the hands of the transferee, a debt claimed to be owing from the transferor.

The issue between the Government and the respondents in this case is not only a question of a separate statute of limitations running in favor of the transferee, or any limitation operating in favor of the transferee,

but whether there is any cause of action of any kind or character at any time against the transferee of the assets of a debtor, unless there is first established a subsisting claim against the transferor, as the necessary foundation of the suit against the transferee.

From the argument of the Government in this case, it would seem that, as a creditor, the Government is no longer concerned with its claim against the taxpayer. It claims, in effect, although this is no where so stated in the Government's brief, but is necessarily deducible from it, that by the distribution of its assets to its stockholders, the Updike Grain Company created a trust for the benefit of the Government, and thereby, of course, discharged its own liability to the Government, and made this money in the hands of the stockholders a trust fund for the use and benefit of the Government, to which the Government may resort for the satisfaction of the claim which it formerly made against the taxpayer, but now, by the necessary logic of the Government's argument, is no longer the obligation of the taxpayer.

That money which ought to have been used by a taxpayer to pay its taxes, but is transferred in fraud of the Government's rights, does not thereby become the money of the Government, has been expressly held and decided by this court, with the sympathy and suggestion of the Treasury Department itself, in the case of *Johnson v. United States,* 268 U. S. 220.

The only time when the assets of a dissolved corporation, transferred to its stockholders, differ in any respect from the transferred assets of an individual

debtor, is when a court of equity has taken over the liquidation of the corporation for the benefit of all creditors and of stockholders. Then, for the first time, the so-called trust fund theory becomes applicable. Before that the assets of an insolvent corporation are not held in trust by the corporation itself for its creditors, in any proper sense of the term, or in any other sense, other than that every debtor owes an obligation to use his property for the discharge of his debts, and this obligation is frequently enforceable by appropriate proceedings in equity, and, in such proceedings, property may be impressed with a trust.

This was distinctly ruled as to Nebraska corporations by the Supreme Court of Nebraska, in *Shaw v. Robinson & Stokes,* 50 Neb. 403, where it was held that the right of a debtor to prefer one creditor over another in the absence of bankruptcy was not affected by the fact that the debtor was an insolvent corporation. Obviously, if property of an insolvent corporation is held in trust, it must be administered as a trust for the benefit of all, and not for one of the beneficiaries.

Treating this suit then as it should be, as a creditor's bill, to collect from the transferee of property, an obligation that ought to have been paid by the transferor, the answer to the question propounded by the Government as an appellee in this case, is not difficult.

It is to be noted that neither the statutes of Nebraska, nor any revenue law or other statute of the United States can be invoked in aid of the liability alleged against these stockholders. Not even Sec. 280

creates any liability against stockholders, it merely offers a remedy for the enforcement "of any liability at law or in equity," which may exist against transferees in favor of the Government. The liability of the transferees must be determined primarily by the law of Nebraska under which this corporation was organized and dissolved, aided, no doubt, by general principles of equity relating to such transactions, and as to these the rulings in Nebraska do not differ from the current of decisions elsewhere.

It is the settled law in Nebraska that before a suit can be brought against the transferees of the property of a corporation, to collect a debt of the latter, the obligation must be reduced to judgment and execution at law issued.

Mer. Nat. Bk. v. McDonald, 63 Neb. 363.

In all of such proceedings it is recognized that a suit against a transferee is ancillary to the principal obligation of the original debtor, and that it can never be enforced unless there is an existing obligation of the original debtor upon which the money collected by the ancillary proceedings may be applied. It is the law of Nebraska, and it is in accordance with the latest ruling of this court upon the subject, even when the Government of the United States is enforcing a claim against an insolvent and dissolved corporation, that it is a necessary prerequisite for the maintenance of the suit in equity against the stockholders, that a judgment at law must be obtained against the principal debtor, and execution issued and returned unsatisfied. *Merchants Nat. Bk. v.*

McDonald, 63 Neb. 363; *Pierce vs. United States,* 255 U. S. 398.

It is said in the latter case, (p. 403):

> "But when a corporation devests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders, cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied (*Hollins v. Brierfield Coal & I. Co.,* 150 U. S. 371.)"

> "A judgment creditors bill is in essence an equitable execution." (p. 402)

The formality of obtaining a judgment and having execution issued against the insolvent debtor may well be waived by the transferee in a suit brought against him, or its necessity may be abolished by statute. *McWilliams vs. Excelsior Coal & I. Co.,* 298 Fed. 884.

But in any case, whether the judgment at law is obtained, or proceedings directly against the transferees are authorized or permitted, the essential nature of the proceeding remains the same. It is still ancillary to the main claim which must be established if disputed, either by a judgment at law or in the equity suit in which relief is sought.

Porter vs. Wingert, 200 Ia. 1371;

Cunningham vs. City of Cleveland, 98 Fed. 657;

Houghton vs. Axelsson, 64 Kans. 274;

Pierce vs. United States, 257 Fed. 514;

A creditor's suit is so dependent upon the prior suit to recover judgment upon the debt, that the courts of the United States have jurisdiction of such suits, although between citizens of the same states, if the original action in which the judgment was obtained had the requisite diversity of citizenship. *New Orleans v. Fisher,* 180 U. S. 185; *Hatcher v. Hendric,* 133 Fed. 267; *Dewey v. Coal Co.,* 123 U. S. 329; *Campbell v. Min. Co.,* 141 Fed. 610.

Proceedings to collect from a transferee, a claim or obligation of its transferor, are always ancillary to the principal claim, and can never arise above their source, and can not be pressed after the principal obligation has ceased to exist.

This proposition is so well understood in the law that it has been enforced in various ways. It is well settled that if the claim or judgment against the principal debtor becomes barred by limitation or otherwise, even while the ancillary proceedings are pending in court, the result is to terminate the right to prosecute the ancillary proceedings.

A leading case on this proposition is *Dole vs. Wilson,* 39 Minn. 330, where the court said:

> "The plaintiff is seeking, through the equitable jurisdiction of the court, to have this land appropriated to the satisfaction of his judgment after the judgment itself has expired by lapse of time. Equity will regard the statutory limitation upon the life and enforcibility of the judgment, and will not inter-

fere to enforce its satisfaction by means of its peculiar remedies; thus avoiding the effect of the statutory limitation, if by the plaintiff's own neglect, the judgment has been suffered to remain unsatisfied until it has ceased to exist as a legal obligation.

And with respect to the contention that the assets in the hands of the transferee were a trust fund, the court said:

> "The plaintiff contends that the lapse of time has not prejudiced the right of action here asserted, because, upon the facts alleged, the law implies and declares a trust in favor of creditors, as respects the land in question. The rule exempting cases of trust from the operation of statutes of limitation is not applicable to resulting trusts of this nature, which do not involve the peculiar confidential relations generally subsisting between trustees and *cestuis que* trust."

In *Flagg vs. Flagg,* 39 Neb. 229, the Supreme Court of Nebraska held that while proceedings were pending in equity to enforce a judgment, which became dormant while the suit was pending, upon that fact being called to the attention of the court by supplemental answer, the proceedings in equity must be dismissed and the claim of the judgment creditor denied.

This appears to be the general rule except where controlled by special statute. *Holmes vs. Webster,* 98 Neb. 105; *Fisher vs. Woodard,* 103 Neb. 253; *Newell vs. Dart,* 28 Minn. 243; *Bank vs. Braithwaite,* 7 N. D. 352; *McAleer vs. Clay County,* 42 Fed. 665; *Board of Commissioners vs. Tome,* 153 Fed. 81; *General Electric Co. vs.*

Hurd, 171 Fed. 984; *Mullen vs. Hewitt,* 103 Mo. 639; *Scott vs. Neely,* 140 U. S. 106.

In the case last cited, the court said:

> "In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment."

There is no analogy between this case and the cases cited by government counsel where the statutory limitation against a suit by the government to annul a patent for public lands, did not operate as a bar to a suit by the government to recover the value of lands, where the patent had been procured by fraud.

At pages 12, 45 and 59 of the Government's brief, reference is made to the case of *United States vs. Whited & Wheless,* 246 U. S. 552, and other similar cases wherein it was held that the statute of limitations expressly applicable to suits by the Government to annul a patent for public lands, was not applicable to suits to recover the value of the land, on the ground of fraud in procuring the patent.

The important distinction between the two cases arises from the fact that in the case of the public lands, the suit to recover the value of the land is in no sense subordinate or ancillary to the suit to annul the patent. Upon the contrary, it is an alternative and an entirely independent proceeding, and it has been held in subsequent decisions that the Government must elect whether it will avail itself of one remedy or the other, and

having made its final election, it has thereby lost the other remedy. *United States vs. Oregon Lumber Co.*, 260 U. S. 290.

But in *Pierce vs. United States*, 255 U. S. 398, where it was contended that a suit against a transferee of assets of a corporation could not be maintained, because the Government had prosecuted a suit in another jurisdiction to enforce an agreement made by the transferee of the assets, it was held that such action did not amount to an election of remedies which would bar the Government from following by creditors' bill the assets of the judgment debtor in the hands of its stockholders. The suit against the purchaser did not amount to an election of remedies which should have defeated the creditors' bill against the stockholders.

Of course, it is familiar practice that in efforts to collect a judgment at law, one creditors' bill may follow another, or both may follow several executions or other proceedings claiming a right to collect a debt in some other jurisdiction, without any question ever arising as to election of remedies.

It is to be noted that the Government cites no cases whatever in support of its proposition that the creditor's suit against the transferee may be prosecuted independently of the existence of a continuing liability on the part of the taxpayer.

In the brief, at pp. 23, 24 and 25, and subsequent pages, there is an argument to the effect that a suit against the stockholders of a corporation to recover from

them a debt originating with the corporation, is a distinct suit, and governed by separate statutes of limitation and separate procedure.

It is unfortunate that most of the cases on which the Government relies in this discussion are not suits to recover a debt of the corporation out of assets transferred by the corporation to its stockholders, but are cases in which the creditor was relying upon a statute relating to a separate and independent liability on the part of stockholders for the corporation's debts, either because of an unpaid subscription to the capital stock, or on the double liability of stockholders, created by both state and Federal statutes, or a liability upon stockholders because of some failure to comply with the statutes relating to corporations. Those cases have no application to this discussion. Thus, in *Bourne v. Baer,* 107 Neb. 255, cited at p. 27 of the Government's brief, the liability there asserted was upon two grounds, one to recover unpaid subscriptions to the capital stock, and the other to recover from the stockholders the amount of the debt of the corporation as a penalty arising from the failure of the officers to cause notice of indebtedness to be published, as required by the state statute. There was no question in this case of pursuing the transferred assets of a corporation. So, in *McDonald v. Thompson,* 184 U. S. 71, cited on p. 25 of the Government's brief, the action was by a receiver of a national bank to recover the liability imposed by statute, and not for the recovery of transferred assets.

In *Whitman v. Oxford National Bank*, 176 U. S. 559, also cited on p. 25 of the Government's brief, the action was to recover on a statutory liability of stockholders of corporations organized under the laws of Kansas.

Case vs. Beauregard, erroneously cited as in 101 U. S. 688, but actually found in the original decision in 99 U. S. 119, where it appears that the suit was against the assets of a partnership, in no manner involves the question we are discussing.

The later case of *Case vs. Railroad Co.*, 101 U. S. 688, merely held that the decision in the first case constituted an adjudication of the issues tendered by the second. In any case, there was no question about following the transferred assets of a dissolved corporation.

Terry v. Anderson, 95 U. S. 628, cited on pp. 24 and 25 of the Government's brief, was a suit on the unpaid subscription of the stockholders of a bank, and had nothing to do with transferred assets.

As to the cases cited by counsel at the beginning of p. 23 of Government's brief, being the early decisions of this court that are assumed to be the foundation of the adoption of the trust fund doctrine, it is, of course, sufficient to say that they are not controlling as against the decisions of this court in the later cases cited on the same page. But even the earlier decisions are all consistent with the present doctrine of the assets of corporations, since they merely held that a creditor of an insolvent or dissolved corporation, is not by reason of the dissolu-

tion barred from enforcing his claim at all, as was the case at common law, but that he is entitled to collect his debt out of such of the assets of the corporation as have not passed into the hands of a purchaser for value. Not all of these cases discuss the procedure by which the claim may be satisfied, and they are all consistent with the theory that the remedy of a creditor of a corporation is exactly the same as the creditor of an individual as to transferred assets.

In *Mumma v. Potomac Co.*, 8 Pet. 281, the only holding was that under the local law affecting the corporation, the corporation, after its dissolution, could not be sued, nor could a former judgment against it be revived by *scire facias*. It was suggested by the court that the creditor was not without remedy, since he could enforce his claim against any assets of the corporation which had not passed into the hands of purchasers, and the only trust apparent in that case was one specifically created by the statute creating the corporation.

In *Railroad Co. v. Howard*, 7 Wall. 392, the holding merely was that where a court of equity takes possession of the assets of a corporation to foreclose a first mortgage on it, it will retain any surplus proceeds from the sale, and administer it as a trust fund for the payment of other creditors. This is also quite consistent with the later holdings on the subject.

In *Curran v. Arkansas*, 15 How. 304, the plaintiff was a creditor of an insolvent banking corporation, created under the laws of Arkansas, and which, by later enactments, was dissolved and its assets transferred to the

state of Arkansas itself. The court held that creditors of the bank could pursue the assets into the hands of the state and recover them. This was by a divided court, three justices dissenting.

In *Sanger v. Upton,* 91 U. S. 56, the suit was to recover unpaid subscriptions to the capital stock, and the decision seemed to have no bearing upon the issues here.

In *Swan vs. Frank,* 148 U. S. 603, the holding was that a creditor could not pursue the transferred assets of a dissolved corporation, because he had not obtained a judgment against the corporation. There is one dissenting opinion holding that in that particular case a judgment could not have been obtained, and, therefore, the action ought to be maintainable.

2.

The Government on page 29 of its brief states its contention as follows:

> **"Even though it should be conceded that the defense of a statute of limitations relating to the collection of taxes was available to the respondents, such defense fails in this case for the reason that the returns required by law have not been filed, without which no statute of limitations has been set in motion."**

We challenge the contention that returns were not filed, and will discuss that, *infra,* but will concede that contention for the purposes of this portion of the brief.

The point made by the Government under this portion of its brief is that the taxpayer filed no return for the fiscal period involved; that under Section 278 (a) the tax could be assessed, or a proceeding in court for

the collection of such tax, without assessment, could be begun at any time, and that, therefore, when the tax was assessed in January, 1920, it was not assessed "within the statutory period of limitation properly applicable thereto." In other words, it is said that the period for the assessment of a tax, where no return has been filed, is "at any time," but because "at any time" is an unlimited period, it cannot therefore be a period of limitation. A mere quibble over words and phraseology to defeat the plain intent of Congress, which is plainly indicated in a comparison of the 1926 Act with the 1924 and prior Revenue Acts, and in the proceedings and reports of the committees of Congress, when the 1926 Act was under consideration.

Fortunately for the respondents the word "period" has been given a statutory definition or construction in the Revenue Act of 1924, which, undoubtedly, Congress had in mind and adopted when it drafted Section 278 (d) of the 1926 Act. Section 278 (a) of the 1924 Act is the same as Section 278 (a) of the 1926 Act.

In Sub-division (d) of the 1924 Act, it is provided:

> "Where the assessment of the tax is made within the period prescribed in Section 277 or in this Section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

When we look for "the period pres bed * * * in this Section," we find that the only "period prescribed" is "at any time."

The word "period" was likewise given the same statutory definition, interpretation or construction in another part of the 1924 Act. In Section 1009 (b) of that Act, it is provided:

> "In case of a false or fraudulent return with intent to evade tax, or a failure to file a required return, or of a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

In Sub-division (c) of the same Section, it is provided:

> "Where the assessment of the tax is made within the period prescribed in subdivisions (a) and (b) such tax may be collected by distraint, or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period provided in subdivision (a) for the beginning of such proceeding."

As there was no other "period prescribed" in Subdivision (b) than "at any time," Congress could only have intended that "period" should mean "at any time."

No such narrow, strained or forced construction or interpretation has been indulged in by the Government when its interests required a contrary construction, because in the following General Counsel's Memoranda and Rulings it has been determined that the phrase "statutory period" as used in Section 278 (d) of the Revenue Act of 1926, means the statutory period plus any additional

time extended by waivers, even though the waivers were unlimited as to time.

G. C. M. 2513, Ruling VI-45-3496.

G. C. M. 2939, Ruling VII-6-3597.

G. C. M. 2408, Ruling VI-41-3461.

In *Atkins vs. Bender,* 26 Fed. (2d) 690, (D. C. W. D. La.), the court adopted the same view.

It might also be helpful in arriving at the intent of Congress with respect to the effect of subdivision 278 (d) of the Revenue Act of 1926 to note that in Sec. 250 (d) of the Revenue Act of 1921, it is provided:

> "That in the case of a false or fraudulent return with intent to evade tax or of a failure to file a required return, the amount of tax due may be determined, assessed and collected and a suit or proceeding for the collection of such amount may be begun at any time after it becomes due."

In the 1924 and 1926 Acts, Section 278 (a) is as follows:

> "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun *without assessment,* at any time."

It will be noted that in the 1921 Act, the two separate remedies of assessing at any time, and of a suit or proceeding at any time, are cumulative and there is no restriction on the conditions for bringing the suit or proceeding. In the 1924 and 1926 Acts, the two remedies are given in the alternative, the tax may be assessed, "or"

a proceeding in court for the collection may be begun "without assessment" at any time.

If the Acts of 1924 and 1926 have the construction contended for by the complainant in this case, that is, that there is never any limit on a suit to recover the tax after it has been assessed, then there is no reason why Congress should have made any change in that respect from the 1921 Act, since that had been construed to mean just what the complainant contends the later acts mean. Congress must have had some purpose in changing the language. Subdivision (a) in Sec. 278 in the later acts places no limit on the time within which the tax may be assessed and places no limit on the time within which a proceeding in court may be begun for the collection of the tax "without assessment." But it obviously left open for further treatment any limitation which Congress intended to make on the collection of a tax after an assessment had been made. This is found in subdivision (d) of Sec. 278 of the two acts. These differ from each other, but properly construed they both mean substantially the same, except that the 1924 Act uses the language "within the period prescribed in Sec. 277 or in this section," whereas the 1926 Act uses the language "within the statutory period of limitation properly applicable thereto;" thus indicating that where the 1924 Act applies only to assessments made, as prescribed in Sections 277 and 278 of that Act, yet the 1926 Act was not so limited, but will apply to an assessment made anywhere, at any time, under any section of any act.

It should also be noted that in the 1924 Act and prior Acts, when reference is made to statutes of limitation

contained in some of the sections, the specific sections were referred to, but, in the 1926 Act a definite policy was adopted and adhered to, by the uniform use of the expression "within the statutory period of limitation properly applicable thereto," instead of by reference to the particular sections containing such limitations.

No one can review the history of income tax legislation during the ten years preceding the passage of the 1926 Act, without reaching the irresistible conclusion that Congress intended in both the 1924 and 1926 Acts to put a time limit upon the collection of old taxes in all cases where the Government had become cognizant of the fact that a tax was owing.

Beginning with the Revenue Act of 1918, it has, in each successive act, put a time limit upon both the assessment and collection of income, war-income, and excess-profits taxes, in all cases where a substantially correct return had been filed, regardless of whether the return correctly stated the net income or not.

Section 250 (d) of the Revenue Act of 1918.

Section 250 (d) of the Revenue Act of 1921.

Section 1322 of the Revenue Act of 1921.

Section 1320 of the Revenue Act of 1921.

Section 277 (a) (2) of the Revenue Act of 1924.

Section 277 (a) (3) of the Revenue Act of 1926.

Section 1109 (a) (1), (2), (3) of the Revenue Act of 1926.

As early as the Revenue Act of 1916, the taxpayer who failed to file a return, or who even filed an erroneous,

false or fraudulent return, was relieved from an assessment if the Government did not discover that fact within three years after the return was due.

Section 14 (a) of the Revenue Act of 1916.

In the 1918 Act, a five year limitation applied to both the assessment and collection of taxes against persons who failed to file a return, and the limitation period started to run from the date the return was *"due."*

Section 250 (d) of the Revenue Act of 1918.

In the Revenue Act of 1921, a four year limitation upon the assessment and a five year limitation upon proceedings to collect was prescribed with respect to all internal revenue taxes not specifically covered by other limitation provisions in the Act. The period of limitation started to run from the time the tax was *"due"* in every case where the taxpayer acted in good faith, and only excepted cases where there was fraud "with intent to evade" tax or a "wilful" attempt to defeat or evade the tax.

Sections 1320 and 1322 of the Revenue Act of 1921.

In the 1924 and 1926 Revenue Acts, limitations of four years in some instances and five years in others were prescribed for both the assessment and collection of the tax, and even protected a taxpayer who had filed a false or fraudulent return, if he did so without intent to evade tax.

Sections 277 (a) (2) and 278 (a) of the Revenue Act of 1924.

Sections 277 (a) (3) and 278 (a) of the Revenue Act of 1926.

In the 1921 Act, Congress first coupled together in the limitation provisions the person who filed a false or fraudulent return with the person who failed to file a return, making the period of limitation for both the assessment and collection of the tax "at any time;" but in the case of the person who filed a false or fraudulent return, there was a limitation of five years unless such person did so with an "intent to evade tax," while in the case of a person who failed to file a return, no amount of good faith or good intent permitted him to avail himself of the lesser limitation period. The reason for this advantage to the person filing a false or fraudulent return over the person who, in the utmost good faith failed or neglected to file a return, has nowhere and at no time been explained, and seems indefensible.

Section 250 (d) of the Revenue Act of 1921.

In the 1924 and 1926 Acts, the time for the assessment of the tax in the two cases named above remained the same as in the 1921 Act, to-wit: "at any time;" but a six year limitation was placed upon proceedings for the collection of the tax, after an assessment had been made; starting to run from the date of the assessment of the tax. That time was undoubtedly adopted, (as will be shown, infra, from the proceedings before the Committee on Finance of the Senate,) because Congress did not wish any statute of limitations to run against the Government in those instances, until after the Government had acquired knowledge of the obligation for the tax. The assessment of a tax both settled the question of the knowledge of the

Government, and furnished a definite date for the beginning of the limitation period.

In construing limitation provisions in a tax law, we must keep in mind that they are not limitations upon the enforcement of some Government claim arising out of some contract or tort obligation where the conduct of the debtor has been involved in the creation of the obligation, but are limitations upon a statutory obligation created by the arbitrary and *ex parte* action of the Government in the exercise of its taxing powers.

The Government must and can look only to its statutes for the obligation it has thus created, and there is no odium attaching to the citizen who points to the same statute for a termination of the obligation.

In the case of *Wood vs. Carpenter,* 101 U. S. 135, it is said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."

By reason of the arbitrary nature of tax laws, they are strictly construed against the Government and liberally construed in favor of the taxpayer, and the same rule

of construction applies to the limitation provisions in tax laws.

In the recent case of *Bowers, Collector of Internal Revenue vs. New York & Albany Lighterage Co.,* 273 U. S. 346, 47 S. Ct. Rep. 389, this court, in construing a limitation provision in the Revenue Act of 1921, said:

> "Taxing laws are to be interpreted liberally in favor of the taxpayer. (Syllabus.)
> * * * * * *
>
> "The question for decision is this: Where, under the tax laws enacted prior to the Revenue Act of 1921, income and excess profits taxes were assessed within five years after filing return, does Sec. 250 (d) of that act bar collection by distraint proceedings begun after the expiration of the five-year period?
>
> "The part of the subdivision that has a bearing is printed in the margin. The clause in controversy is: 'No suit or proceeding for the collection of any such taxes . . . shall be begun, after the expiration of five years after the date when such return was filed.' Petitioner insists that the word 'proceeding' refers only to a proceeding in court and means the same as 'suit;' and that the act prescribes no limitation against the collection of such taxes by distraint.
> * * * * * *
>
> "He maintains that any ambiguity in the clause under consideration must be resolved in his favor. Undoubtedly the United States will not be held barred by a general statute of limitation unless, upon a strict construction in its favor, the United States and the claim sought to be enforced fairly may be held to be within the terms and purpose of the statute. *E. I. Dupont de Nemours & Co. vs. Davis,* 264 U. S. 456, 462, 68 L. Ed. 788, 791, 44 Sup. Ct. Rep. 364. That rule rests upon the general principle of policy applicable to all governments that the public interest should not be prejudiced by the default or negligence

of public officers. *United States v. St. Paul, M. & M. R. Co.*, 247 U. S. 310, 314, 62 L. Ed. 1130, 1132, 38 Sup. Ct. Rep. 525. The limitation applies to petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. Ed. 697, 701, 22 Sup. Ct. Rep. 515; *Schwab v. Doyle*, 258 U. S. 529, 536, 66 L. Ed. 747, 753, 26 A. L. R. 1454, 42 Sup. Ct. Rep. 391.

* * * * * *

"The provision is to be applied in harmony with the intention reasonably to be inferred from its terms and the circumstances of its enactment. *Cf. United States v. Oregon Lumber Co.*, 260 U. S. 290, 299, 67 L. Ed. 261, 270, 43 Sup. Ct. Rep. 100. Prior to the Revenue Act of 1918 there was no limitation against suit to collect income taxes. Section 250 (d) of that act (February 24, 1919) 40 Stat. at L. 1083, chap. 18, Comp. Stat. Sec. 6336, Fed. Stat. Anno. Supp. 1919, p. 115) required assessment within five years after return, and prohibited the commencement of suit or proceeding to collect such taxes after that period. This bar was held to apply only in respect of taxes for 1918 and later years. Then Sec. 250 (d) of the Act of 1921 made the limitation apply against collection of taxes under all the earlier acts; and, in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors, prescribed the five-year period for determination and assessment of taxes under earlier acts, but allowed only four years as to those for 1921 and succeeding years. The same purpose is shown by the requirement that the commissioner, within one year after request by their personal representatives, shall make assessments on income received by deceased persons. These stricter limitations applicable to taxes for the later period make against the petitioner's contention that the act sets no bar against collection by

distraint. A reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made and pressed within five years."

We do not need to resort to statutory enactments alone to ascertain the intention of Congress in this respect, because it was made quite plain by Mr. A. W. Gregg, then General Counsel of the Bureau of Internal Revenue, at the hearings before the Committee on Finance of the Senate upon the Revenue Act of 1924, in considering the effect of these provisions as they appeared in Section 1009 (b) and (c) of that Act, quoted, supra, and which are identical with Section 278 (a) and (d) of the same Act, and also as they appeared in Section 278. We set forth the substance of the proceedings as they appear on pp. 39, 40, 41, 49, 50, 51 and 52.

Section 278 (d) of the 1924 Revenue Bill, as it came to the Senate from the House, provided "Where the assessment of the tax is made within the period prescribed in Sec. 277 or in this section, such tax may be collected at any time by distraint or by proceeding in court * * *." In considering this sub-section a discussion arose between Mr. Gregg and various senators (pp. 39-41) as to whether or not there should be a time limit upon the right to collect after an assessment had been made and not leave the time within which the Government may collect open forever, by the use of the phrase "at any time." Action thereon was deferred, but several days later the Committee took up for consideration Section 1009 (b) and (c) of the bill, which was in identical language in that

respect with Section 278 (a) and (d). In that discussion (pp. 49-52) several senators insisted that after the Government had made an assessment there should be a limit upon the time within which it might proceed to collect. Thereupon the question arose as to whether this should apply to fraud cases and no return cases, when the following colloquy took place:

"Senator King (interposing). You distinguish between cases where a return is filed and where there is no intent to deceive and cases where a man delibrately files no return?

"Mr. Gregg. Yes, sir.

"Senator King. In the first instance you were put on notice and you can inquire and ascertain whether there have been any omissions in the return. In the second instance you have not been put on notice, and your contention is that you should have an indefinite period within which to make your assessment. But do you not think in the latter case, after you have made the assessment, there ought to be a limitation within which you may prosecute to a successful issue your claim for the tax?

"Mr. Gregg. * * * There are cases occasionally where we find a taxpayer has failed to file a return, but sometimes we can not prove deliberate fraud. It seems to me that the statute should not begin to run against the Government until the Government is put on notice in a case of this kind.

"Senator Reed of Pennsylvania. The only offenses against which there are no statute of limitations are murder and treason. Why should we class this offense with those two?

"Mr. Gregg. This is not a penalty for the offense; this is for the collection of the tax. There is a statute of limitations on the criminal penalties.

"Senator Reed of Pennsylvania. This is not a thing that I would debate at any length.

* * * * *

"Senator King. As far as I am concerned, if they put in a provision that, after having made the assessment, there will be a period of limitation of 10 years within which they must prosecute to a successful conclusion—

"Senator Jones of New Mexico (interposing). I think six years would be all right.

"The Chairman. Turn to page 177 of the bill and let us fix both of them at the same time.

"Mr. Gregg. Page 177, line 15, strike out the words 'at any time' and insert 'within six years after the assessment.'"

This intention of Congress to put a limitation of six years upon proceedings for the collection of taxes assessed in those cases where no return had been filed, was again evidenced by the interpretation placed upon Section 278 (d) of the Revenue Act of 1926, when that subdivision was up for discussion before the Senate, after that section, as it appeared in the 1924 Act, had been rewritten by the Senate Finance Committee to make it retroactive, in the language in which it appeared in the 1926 Act as passed.

It has been heretofore shown that "fraudulent return" cases and "no return" cases are coupled together in the same limitation provisions of Section 278, consequently whatever limitation provisions applied to "fraud" cases would necessarily apply to "no return" cases.

Section 278 (d) came up for discussion on the floor of the Senate on February 5th, 1926, after being reported

as re-written by the Senate Finance Committee, when the following colloquy took place between Senator King of Utah and Senator Reed of Pennsylvania, ranking member of the Senate Finance Committee to the Chairman, and in charge of the bill on the floor of the Senate at the time:

"Mr. Reed of Pennsylvania. Now, Mr. President, I ask consideration of the committee amendment at the bottom of page 137.

"The Vice President. The amendment will be stated.

"The Chief Clerk. On page 137, after line 23, the Committee on Finance proposes to strike out:

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun (1) within six years after the assessment of the tax, or (2) at any time prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer.

"(e) This section shall not affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act, nor shall it authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court (1) if at the time of the enactment of this act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) contrary to the provisions of subdivision (a) of section 274.

"And in lieu thereof to insert:

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable

thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer.

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the revenue act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this act the commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this act.

"Mr. King: That relates to fraud, does it not?

"Mr. Reed of Pennsylvania: Yes.

"The Vice-President: The question is on agreeing to the amendment.

"The amendment was agreed to."

(Volume 67, No. 43, Congressional Record, 69th Congress, First Session dated Friday, February 5th, 1926, page 3,068).

That the Bureau of Internal Revenue so interprets Subdivision (d) of the Revenue Acts of 1924 and 1926 is shown in an opinion of Mr. C. M. Charest, General Counsel of the Bureau of Internal Revenue, known as G. C. M. 2939, Int. Rev. Bull. VII-6-3597, promulgated February 6, 1928, wherein, in discussing the difference in the time

limit for the "assessment," from the time limit for the "collection" of income taxes after assessment, he said:

> "The Revenue Act of 1924, enacted June 2, 1924, provided in section 278:
>
> "(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. * * *
>
> "(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.
>
> "To the same effect is section 278 (d) and (e) of the Revenue Act of 1926.
>
> "Thus it is apparent that for every case within the purview of the Revenue Act of 1924 a six-year collection period attached after the assessment was made, this regardless of whether the assessment was made before or after the enactment of the Act. (In re *McClure Co., Bankrupt,* 21 Fed. (2d) 538, T. D. 4097 (Internal Revenue Bulletin VI-43, 7); *U. S. v. Crook,* 18 Fed. (2d) 449, certiorari denied by United States Supreme Court October 17, 1927). This holding is based on the general rule of law that a change in the statute of limitations operates to change the period of enforcement of existing causes of action as well as of those accruing thereafter. (*Sampeyreac v. U. S.,* 7 Peters 222; *Sohn v. Waterson,* 17 Wallace 596; *Crothers v. Edison Electric Co.,* 149 Fed. 606)."

Tax laws, like other laws, must be given a reasonable and sensible construction and interpretation, and also a

construction and interpretation that will carry out the obvious intent of the law makers.

Bowers, Collector vs. N. Y. & Albany Lighterage Co., supra.

In *Cohn & Sons Co. v. Commissioner,* 9 B. T. A. 87, a tax case, it is said:

> "Statutes should receive a sensible construction, such as will effectuate the legislative intention, and avoid, if possible an unjust or absurd construction."

Reverting again to facts that obviously disclose the intent of the makers of the Revenue Act of 1926 with respect to Section 278 (d) of that Act, we once more call attention to the fact that the Bureau of Internal Revenue has always construed Section 278 (d) of the Revenue Act of 1924 as applying to assessments made in cases where no return had been filed, and as they were advising the committees having in charge the passage of the 1926 Act, of course so advised those committees.

In the 1926 Act, as originally drafted, and as reported by the Committee on Ways and Means of the House to the House of Representatives, under date of December 7th, 1925, no change had been made in the first sentence of Section 278 (d) as the same appeared in the 1924 Act. In describing the scope of that Sub-division in said report, it is said under the heading,

"Suits to Collect Tax":

"Section 278 (d).

"Sub-division (d) provides that where an assessment of tax is made such tax may be collected by distraint or proceeding in court begun within six years of the assessment of the tax or at any time prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer."

(See page 12 of Report No. 1 of the Committee on Ways and Means of the House of Representatives on House Rule No. 1, dated December 7th, 1925.)

In fact, when the "Managers on the Part of the House" made the report of the Conference Committee to the House after the bill had passed the Senate with Sub-division (d) re-written as aforesaid, they said:

"Amendment No. 85: This amendment rewrites in more definite language, and correcting clerical mistakes, subdivisions (d) and (e) of section 278 of the House bill, dealing with the time within which distraint or proceeding in court may be begun after the assessment has been made. The House recedes."

(See page 42 of Conference Report to House of Representatives No. 356 accompanying House Roll No. 1 dated February 22, 1926).

That it is proper for this court to consider the above matters in arriving at the intent of Congress, we refer to the following cases:

St. P. M. & M. R. Co., 247 U. S. 310;

Ex Parte Williams, 297 U. S. 267.

Applying the rules of statutory construction and interpretation applicable to all statutes compels the conclusion for which the respondents contend. When coupled with the rule of liberal construction governing taxing statutes for the benefit of the taxpayer, the defendants' contention can admit of no doubt.

II.

Was the collection of the sum sought to be recovered herein from the defendants, as transferees of the assets of Updike Grain Company, barred by sections 250-d of the Revenue Act of 1921, and 277 (a) (2) of the Revenue Act of 1924?

This question calls for an examination of the record to ascertain if returns were filed for the Updike Grain Company, which started the running of the limitation provisions in Sections 250 (d) of the Revenue Act of 1921, 277 of the Revenue Act of 1924, and 277 of the Revenue Act of 1926, which all relate to those cases where returns were filed.

Omitting the inapplicable provisions, these Sections are as follows:

Section 250 (d)—Revenue Act of 1921. (42 Stat. 265)

> "The amount of income, excess profits, or war profits taxes * * due under any return made under this act for prior taxable years or under prior income, excess profits, or war profits tax acts, * * shall be determined and assessed within five years after the return was filed, * *; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess profits, or war profits tax acts, * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

Section 277 (a) (2)—Revenue Act of 1924. (43 Stat. 299)

> "The amount of income, excess profits, and war profits taxes imposed by * * the Revenue Act of 1917, * * and by any such act as amended, shall be assessed

within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Before reviewing the record with respect to the returns which were filed of the income of the Updike Grain Company, covering that part of the fiscal period of said company in the year 1917, in question here, it should be kept in mind that under the laws and regulations existing up to the time the assessment of the additional tax was made in the instant case, there were three methods of making returns upon which the tax in question in this case might be assessed, viz:

(a) By the taxpayer.

(b) By the Commissioner of Internal Revenue.

(c) By a collector or deputy collector of Internal Revenue.

It is not claimed that a return was made of the income involved herein by a collector or deputy collector of Internal Revenue. We can, therefore, disregard (c).

Statement of the Record Respecting Filing of Returns.

Prior to 1917, the Updike Grain Company was doing business upon a fiscal year basis and had fixed its fiscal year to terminate upon the 31st day of July. In 1917 it duly designated June 30 as the end of its fiscal year.

Under the laws and regulations then existing, the Updike Grain Company, hereinafter referred to as "company," was required to make its return for the fiscal period ending June 30, 1917, on or before August 29, 1917. The Commissioner of Internal Revenue was re-

quired to make the assessment within 90 days after the due date of the return, to-wit: On or before November 28, 1917 (Sec. 14-a, Revenue Act of 1916), except in cases of refusal or neglect to make such return, and in cases of erroneous, false or fraudulent return, in which cases the law provided that "the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years from the date when said return is due, make a return upon information obtained as provided for in this title, or by existing law; and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation * * * immediately upon notification of the amount of such assessment." (Sec. 14-a, Revenue Act of 1916). Where a return was filed as in this case the taxpayer was required to pay the tax within 105 days from due date of return, to-wit: December 12, 1917.

If the company had failed to make a return of its income for the fiscal period ending June 30, 1917, within sixty days thereafter, it would have subjected itself to the following penalties: (a). A fine not exceeding $10,000.00, (Sec. 14-c, Revenue Act of 1916), (b). fifty per centum of the amount of the tax, to be added thereto by the commissioner, (Sec. 3176 Revised Statutes of the United States, re-enacted in Section 16, Revenue Act of 1916). The fifty per cent penalty was required to "be collected at the same time and in the same manner as part of the tax."

If the company had not paid the tax due under the then existing law upon the income for the fiscal period ending June 30, 1917, within one hundred five days after

the return was due, to-wit, on or before December 12, 1917, it would have subjected itself, after a ten days' notice and demand thereof by the collector, to a penalty of "five per centum on the amount of the tax unpaid and interest at the rate of one per centum per month upon said tax from the time the same becomes due." (Sec. 14-a, Revenue Act of 1916.)

The taxpayer was not relieved of the foregoing requirements by the Revenue Act of October 3, 1917, because in Section 4 of said act, imposing the War Income Tax, it is provided:

> "The tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act."

And in Section 212 of said act, imposing the War Excess Profits Tax, it is provided:

> "All provisions of Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, relating to returns and payment of the tax therein imposed, including penalties, are hereby made applicable to the tax imposed by this title."

In conformity with the above requirements and in order to avoid the penalties set forth above, the company on July 25, 1917, filed with the Collector of Internal Revenue at Omaha, Nebraska, its income tax return for the fiscal eleven-months period ended June 30, 1917, duly subscribed and sworn to, upon Form 1031 (Revised Octo-

ber 1916), being the only form then in use by the Bureau of Internal Revenue for that purpose (R. 165).

The return thus filed shows the capital stock of the company to be $2,000,000.00 and the total amount of bonded, and other interest bearing indebtedness, etc., to be $1,009,671.91, and the net income to be $2,371,997.05, making the total income tax under then existing laws, $47,439.94, which was paid when the return was filed.

The return was audited by H. B. Barnett. Upon the face of this return (R. 165) is a rubber stamp in the top of which in large type is the word, "Assessment," under which is stamped the word "Tax," opposite which are the figures, "373,911.54." Next below is the stamped word "Penalty," opposite which there is no amount inserted. Below this is the stamped word "Basis," opposite which is the following: "R A R 6-30-1919." Outside of the stamped form, but immediately opposite the foregoing quotation, are the initials "HB" of H. B. Barnett, the auditor in the Income Tax Unit of the Internal Revenue Department at Washington, who audited the return and Revenue Agent's report (R. 287, 288). Next below is the word "Date" followed by "Jan. 1920." Next below is the stamped word, "Page," followed by "14", and the stamped word "Line," followed by "1". No other assessment stamp appears upon this return. Diagonally across the top are the rubber stamped words "Return audited."

On August 30, 1917, the company filed its excess profits tax return for the same fiscal period, on Form 1095, also being the only form then in use by the Bureau

of Internal Revenue for that purpose. This return was duly subscribed and sworn to (R. 171). Printed in the heading of this form is the following:

> "This supplemental income tax return is to be filed by all corporations * * having an annual net income in excess of $5,000.00 and making income tax returns on a basis of a properly established fiscal year ending with the last day of some month in 1917 other than December 31."

This return showed the total amount of actual capital invested and used in the business to be $2,100,844.05, made up of actual cash paid in of $2,000,000.00; paid in and earned surplus and undivided profits used or employed in the business to be $100,844.05; total net income for fiscal period $2,371,997.05; total profits in excess of exemption for full fiscal year, $2,998,929.53; and after deducting 5/11 of the excess profits for the entire period, showed a total excess profits for the period January 1, 1917, to June 30, 1917, of $1,199,416.11; making the total amount of tax assessable $95,953.29. This amount was paid on August 30, 1917, the day the return was filed. Stamped on the margin with a rubber stamp are the words, "Return audited."

On September 28, 1917, an amended excess profits tax return on Form 1095 was filed with the Collector at Omaha, covering the fiscal period August 1, 1916, to June 30, 1917, duly subscribed and sworn to, (R. 175) showing the total invested capital and total net income to be the same as the first excess profits tax return. Specific exemption was shown at $4,583.33, instead of $5,000.00, and 8% of total invested capital was figured at

$154,061.90, instead of $168,067.52; the change in these two items being due to the fact that they took 11/12 of the specific exemption and of 8% of the total invested capital in the amended excess profits tax return, instead of 12/12 as was done in the first excess profits tax return. This changed all the subsequent figures and showed an additional tax due of $629.33, which amount was paid to the Collector at Omaha, September 29, 1917. This return also had stamped on the margin with a rubber stamp the words "Return audited."

On October 2, 1917, the company addressed and mailed to George L. Loomis, Collector of Internal Revenue at Omaha, the following letter:

> "If a corporation is dissolved during the fiscal year, is there any ruling as to when it should make up its final report, that is, as soon as possible after the dissolution or at the end of its regular fiscal year? (R. 179)."

to which the Collector replied by letter, dated October 3, 1917,

> "when a corporation dissolves it should make a final return and file with the return evidence that the corporation has been dissolved. The final return is due within sixty days from the end of the fiscal year, it may be filed sooner." (R. 183)

On October 3, 1917, the Revenue Act of 1917 was passed.

On October 27, 1917, L. F. Speer, Deputy Commissioner of Internal Revenue, issued a written opinion that a corporation dissolved in June, 1917, is not subject to

the taxes imposed by the Act of October 3, 1917, "for the reason that the Government cannot revive a dead corporation in order to assess taxes which are imposed by laws enacted subsequent to the dissolution of the corporation." (R. 187) This ruling appears to have been later revoked.

On December 18, 1917, a letter was sent by Gorton Roth to George L. Loomis, Collector of Internal Revenue, Omaha, Nebraska, requesting him to send to Roth supplemental blanks for The Updike Grain Company. (R. 193). On January 29, 1918, upon the form furnished by the collector (R. 341), pursuant to the letter of December 18, 1917, being Form 1031 (revised October 1916) containing the same recitals hereinbefore set forth, the company filed its return of net income for the period July 1, 1917, to August 28, 1917, endorsing same as "Final Report." (R. 197). Attached to the return was evidence that the corporation had been dissolved, as suggested by George L. Loomis, in his letter of October 3, 1917 (R. 201), and that the assets had been distributed among the stockholders (R. 201). This return showed no net income, and was also audited by H. B. Barnett. Stamped in the right-hand side of the first page of the return, is the following: "Investigated by agent. No tax due."

In March, 1918, Gorton Roth, former secretary of the company, received through the mail, in an envelope addressed to The Updike Grain Company, without any letter of transmittal, or demand that an additional return be filed (R. 95), blank Form 1031 (revised January,

1918). This form no doubt being sent out by the Collector, in the regular routine of sending forms to all taxpayers annually at that time of year. Thereupon Roth addressed and mailed to the Collector of Internal Revenue at Omaha the letter of March 26, 1918, a communication stating that The Updike Grain Company was dissolved in 1917, and transacted no business after August 27, 1917; that prior to the dissolution of the company, in pursuance of Article 85 of the Income Tax Regulations, as supplemented by the ruling of the Acting Commissioner of March 22, 1917, the corporation retained from its assets, and paid Federal income tax and excess profits tax for the fractional part of the year 1917, "such payments being made in pursuance of the final and fiscal returns duly made and filed in accordance with said rulings;" that prior to dissolution, the company had paid all of its indebtedness in full, and had no indebtedness outstanding or unpaid when dissolved; that all of its assets were distributed to its stockholders at the time of dissolution; that there was not in existence any money or property of the company, nor any officers, directors or stockholders; that he was the former secretary of the company, and was giving the Collector these advices because he was aware of regulation known as Article 61 in reference to the Income Tax Act of October 3, 1917, which, he was advised, is erroneous, and "in order that a statement of the facts in this matter may be made for your records." (R. 91). Although the Collector was thus expressly advised, as aforesaid, no demand was ever made upon the company or its officers by anybody for additional returns (R. 95, 349, 350), notwithstanding Regulation 33, Article 196, effective January

6, 1914, and in force up to December 31, 1921, which was as follows:

> "Where the required returns are not filed within the prescribed time, either by individuals or corporations, notice on Form 1045 should in each case be sent to the delinquent."

During the month of October, 1918, L. C. Smith, Revenue Agent, under the direction of John J. Gillin, Revenue Agent in charge of the Omaha division, and in charge of revenue agents like Smith, examined the books and records of the Updike Grain Company, then in the possession of former secretary Roth, for the years 1913, 1914, 1915, 1916 and 1917, to determine its tax liability for said years and the fiscal period in 1917 ending June 30th, 1917 (R. 95). Mr. Smith had been furnished with Forms 7894, which were summaries of the returns for 1913, 1914, 1915 and 1916, and had instructions to include in his examination the year 1917 (R. 95). The examination was made to check up the returns for the above years, and Mr. Roth furnished him the necessary books to make the audits and everything he asked for. Smith had no summaries or copies of the returns made for 1917, and asked Roth for his copies. Roth had copies and furnished them to Smith (R. 350). Smith testified that upon completing the audit, which he reported in his letter to Gillin, dated October 25th, 1918, (R. 107), he made up the returns referred to in that report, being a Corporation Income Tax Return on Form 1031, (Revised January 1918), and a Corporation Excess Profits Tax Return on Form 1103, (R. 131, 135), and presented them to Nelson B. Updike, the president; and, he believed, to Mr. Roth, the secretary, who said the corpora-

tion had been dissolved and there were no officers with authority to sign the returns, (R. 96). Mr. Roth testified that Mr. Smith never presented those returns to him, and that he never saw them, (R. 349). Mr. Updike testified that Mr. Smith did not present to him any income tax returns for signature, nor did he see any income tax returns prepared by L. C. Smith. (R. 350).

Under date of October 25, 1918, L. C. Smith, Revenue Agent, made a written report to John J. Gillin, Revenue Agent in Charge, Omaha, Nebraska, showing additional taxes due for 1915, 1916 and 1917 and refunds due for 1913 and 1914 (R. 107) The report contains the following recitals:

"With reference to attached Forms 7894 (Revised) showing returns of net income for the years 1913, 1914, 1915 and 1916, filed by the Updike Grain Co., Omaha, Nebr., I have the honor to report that I visited the office of that corporation and *made an investigation of its returns for the years* 1913 *to* 1917, inclusive, returns for prior years having been investigated, and found additional tax liability and refunds due as follows:

	Additional Tax	Refund Due
1913		$258.25
1914		113.01
1915	$ 95.81	
1916	3,094.70	
1917	365,564.61	
Totals	$368,755.12	$371.26

• • • • •

"On account of the inadequate system of accounting kept by this company, it was impossible to make a complete verification of *any return filed, but from all books and records available, it appeared that the full amount of gross income for each year was reported and no improper deductions taken.*

* * * * *

COPY OF RETURN FISCAL YEAR ENDING JUNE 30, 1917

Item 1		$2,000,000.00
2		1,009,671.91
3a	$2,036,898.56	
c	56,252.36	
d	643,791.55	
e	116,657.66	2,853,600.13
4a	375,466.58	
5a	1,277.06	
6a	98,202.35	
7	6,657.09	481,603.08
Net Income		$2,371,997.05
Tax @ 2%		47,439.94

AMENDED RETURN FISCAL YEAR ENDING JUNE 30, 1917

Item 1		$2,000,000.00
2		1,012,771.91
3a	$1,867,157.01	
c	51,564.67	
d	590,142.26	
e	106,936.19	2,615,800.13
4	344,177.70	
5a	1,170.64	
6a	90,018.82	
7	6,102.33	441,469.49
Net Income		$2,174,330.64
Less Dividends (3d)		590,142.26
Income Less Dividends		1,584,188.38

6/11-1917 Proportion		864,102.75
Less Excess Profits Tax		459,081.32
Taxable at 4%		405,021.43
Excess Profits Tax		459,081.32
Income Tax @ 2%		34,304.99
Income Tax @ 4%		16,200.86
Total Tax Liability		509,587.17
Total Tax Paid—		
Income Tax	$ 47,439.94	
Ex. Profits Tax	96,582.62	144,022.56
		$ 365,564.61

2% tax on net income for fiscal period less EPT 1917 portion. Differences:

"*The original return included the business from June* 30, 1916, *to June* 30, 1917, as per book closings of those dates. The end of the fiscal year was redesignated as June 30, and the company given permission to make return on that basis, and the return should have included only eleven months' business from July 31, 1916, to June 30, 1917. It was necessary to adjust the gross income and deductions to that period by eliminating the income and deductions for July 1916, determined by taking 1/12 of the total gross income and deductions of the book closing for the period June 30, 1916, to June 30, 1917.

* * *

"In reply to a letter from the Collector of Internal Revenue for Nebraska, asking for *amended returns* for the year 1917, the enclosed letter (Exhibit A) was directed to his office by Gorton Roth, formerly secretary of the Updike Grain Co.

"*Amended returns* and claims for refund covering adjustments, shown by this report; *for the years,* 1913 to 1917, inclusive, could not be secured, as it was stated by the former secretary of the company

that there were no officers of the company to execute same.

"Unsigned amended returns for the fiscal year (11 months) ending June 30, 1917, are enclosed herewith.

"N. B. Updike, formerly president of the Updike Grain Co. was advised of the differences found and the amount of additional tax resulting therefrom. He stated that it would be necessary to collect the tax from the individual stockholders at the time the company was dissolved, as no provision was made for the payment of this tax before the assets were distributed.

"A list of stockholders on Aug. 28, 1917, the date of dissolution is enclosed herewith." (Exhibit B) (The italics are ours.)

Exhibit "A," referred to in the above report, is the letter of Roth to the Collector dated March 26, 1918.

In the Smith report, noted above, he states that the letter from Gorton Roth, dated March 26th, 1918, to the Collector of Internal Revenue was "in reply to a letter from the Collector of Internal Revenue from Nebraska, asking for amended returns for the year 1917," but Mr. Roth testifies that no such letter was received by him or by the Updike Grain Company, although he handled and saw all of the correspondence had between the Internal Revenue Department and said company with respect to their returns, (R. 95, 349); and Mr. Smith when called as a witness for complainant did not testify that any such letter was sent by the Collector, nor anyone else.

In the same report of L. C. Smith, Revenue Agent, to John J. Gillin, Revenue Agent in Charge, dated October 25, 1918, Mr. Smith says:

"*In addition to verification of income tax returns of the Updike Grain Company,* Omaha, Nebr., I have the honor to report that I made a careful examination of the books and records of the company for the purpose of preparing excess profits tax return on Form 1103, *as required by the Act of October* 3, 1917, and found as follows:

Excess Profits Tax Summary.

Tax Liability under Act of October 3, 1917	$459,081.32
Tax paid under Act of March 3, 1917	96,582.62
Additional Tax Due	$362,498.70"

(The italics are ours). (R. 117).

Then under the heading "Copy Excess Profits Tax Return on Form 1095 under Act of March 3, 1917," he sets forth a synopsis of that return. (R. 117) Then under the heading "Synopsis of Amended Return" he sets forth the return as he concludes it should have been made, and computes the total tax due for the period January 1, 1917, to June 30, 1917, to be $459,081.32. (R. 119) Then appears the following recital:

> "An unsigned *amended return* on Form 1103 is enclosed herewith, as there are no officers of The Updike Grain Company to sign name, the company having been dissolved August 28, 1917." (R. 121) (Italics are ours).

A list of the stockholders of the company and their stockholdings was attached to the report as Exhibit B. (R. 129).

The returns on Forms 1031 (Revised January 1918) and Form 1103, prepared by Smith, contained the sum-

mary of items, as above set forth in his report, and the details making up those items, such as appeared in the returns filed by the grain company. It should be noted at this time that in recalculating the tax for additional assessment under the October 3, 1917 Act, Mr. Smith used the same numbered items that appeared in the returns filed by the grain company for the fiscal period in question, except, of course, he added the additional four percent tax imposed by the Revenue Act of October 3, 1917, and made certain deductions for which the company had made no claim in the returns filed by it, and for which it, of course, was not obliged to make claim. In other words, Mr. Smith's report demonstrates that the company in its returns, as filed, had set forth in good faith all of the items of income, and the facts, data and information appropriate to determine the tax under the new law.

On October 26, 1918, John J. Gillin, Revenue Agent in Charge, addressed and transmitted to Daniel C. Roper, Commissioner of Internal Revenue, the report of L. C. Smith, with four Forms 7894, and the amended returns prepared by Smith on Forms 1031 and 1103, with the letter of Gorton Roth of March 26, 1918, and two balance sheets. The transmittal letter (R. 105) is as follows:

> "I am in receipt of the attached report from Revenue Agent L. C. Smith, dated October 25, 1918, on the subject of his investigation of *the returns of annual net income of the Updike Grain Company,* Omaha, Nebraska, *for the years* 1913 to 1917, inclusive, and also invested capital and income subject to Excess Profits Tax for 1917.

"I respectfully recommend that this corporation be assessed additional tax for 1915, $95.81; for 1916, $3094.70; and for 1917, $365,564.61. Total $368,755.12.

"Forms 7894 for the years 1913 to 1916, inclusive, unsigned Form 1031, unsigned Form 1103, copy of letter dated March 26, 1918, from Gorton Roth to the Collector, and balance sheets as of June 30, 1916, and June 30, 1917, are enclosed herewith.

"Copy of this report, together with Excess Profits Tax Report, furnished Collector Loomis, Omaha, Nebraska." (Italics are ours).

On June 30, 1919, L. C. Smith, Revenue Agent, made a supplemental report to John J. Gillin, Revenue Agent in Charge, correcting the computation of additional tax for the fiscal year ended June 30, 1917, and finding the additional tax to be $373,911.54. (R. 103) Upon the same date Gillin transmitted to the Commissioner of Internal Revenue a copy of this report. (R. 101) On the right hand margin of page 4 of the copy of the Smith report dated October 25, 1918, sent to the Commissioner of Internal Revenue by Gillin and opposite the computation under the heading, *"Amended Return Fiscal Year Ended June* 30, 1917," the tax is recomputed in pencil, and the additional tax due computed to be $373,911.54. (R. 113)

On November 20, 1919, an acting assistant to the Commissioner wrote to the Internal Revenue Agent in Charge, in Omaha, with reference to the report dated October 26, 1918, and the supplemental report dated June 30, 1919, covering the investigation by Revenue Agent L. C. Smith (R. 283) in which it is stated:

"The additional tax still due by the corporation for the eleven months ended June 30, 1917, $373,911.54, is clearly stated in your supplemental report of June 30, 1919. * * * You are instructed to advise the corporation of the result of this audit. A copy of this letter is being forwarded to the Collector for the District of Nebraska."

Also advising as follows:

"Since the corporation failed to file a claim for refund of overpayment for 1913 amounting to $258.25, this office is barred by Section 252 of the Revenue Act of 1917, in offsetting the amount against the additional taxes found to be due."

Thus taking advantage of a statute of limitations against the company.

On November 24, 1919, Gillin, Revenue Agent in Charge, addressed a letter to The Updike Grain Company, (R. 317) as follows:

"This office is in receipt of a letter from the Commissioner of Internal Revenue under date November 20, 1919, relative to investigation of *your income tax returns for the years* 1913 to 1917, inclusive, made by Revenue Agent L. C. Smith, which advises as follows: (The italics are ours).

He then sets forth that part of the letter referred to showing the computations made and the total taxes due and the position that a refund for 1913 is barred. He then concludes the letter as follows:

"The Collector in your district will advise you as to the time and manner of payment of net additional tax."

On November 24, 1919, Gillin, Revenue Agent in Charge, addressed and sent a letter to N. B. Updike (R. 323) as follows:

> "There is enclosed, as requested by your Mr. Roth today, two copies of the following, as shown by the files of this office, in reference to the investigation of the Updike Grain Company:
>
> "*Amended Return,* as made by the investigating officers for the year 1913 and the fiscal years 1914, 1915, 1916 and 1917;
>
> "*Synopsis of Amended Return* for Excess Profits for the fiscal year 1917; and
>
> "*Revised Tax Computation* for the fiscal year 1917, in accordance with Department Letter." (Italics are ours).

The enclosure (R. 325, 335) sets forth the recomputation made by the Revenue Agent respecting the income and excess profits taxes for the year 1917 under the heading, "*Fiscal year ending June* 30, 1917," and under the heading "*Copy of Return*" sets forth a synopsis of the return filed July 25, 1917; and under the heading "*Amended Return*" sets forth the computation as made by Revenue Agent L. C. Smith under dates of October 25, 1918, and June 30, 1919, and at the conclusion of that part of the report made by L. C. Smith dated October 25, 1918, is the following:

> "*The original return* included the business from June 30, 1916, to June 30, 1917, as per book closings of those dates. The end of the fiscal year was redesignated as June 30, and the company given permission to make return on that basis and the *return* should have included only 11 months business from July 31, 1916, to June 30, 1917. It was necessary

> to adjust the gross income and deductions to that period by eliminating the income and deductions for July, 1916, determined by taking 1/12 of the total gross income and deductions of the book closing for the period June 30, 1916, to June 30, 1917." (The italics are ours).

The Revenue Agent in Charge thereby assured the defendants that the returns filed by the company were being recognized and used by the Government as sufficient under the October 3, 1917 Act.

It was apparently on or about the date of the letter of November 20, 1919, from the Acting Assistant Commissioner to the Revenue Agent in Charge, that the assessment in the above amount was stamped upon the income tax return of the company filed July 25, 1917, because the additional tax was placed upon the assessment list by the Commissioner of Internal Revenue for January, 1920. (R. 217, 219, 301).

We do not have a copy of any notice and demand for tax sent out immediately after the assessment of January, 1920, was made, but Mr. Roth testified that a notice and demand was sent to The Updike Grain Company, upon the form in use then, which was either Form 1-17a or 1-17a revised January, 1920. However, both forms contain the following recital:

> "Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax."

In the notices and demands for the additional taxes assessed in January, 1920, sent out immediately after the assessment, and periodically up to December 22, 1921, there was no claim for any penalties for failure to file a return, and the books of the Collector at Omaha contain no assessment of any penalty for failure to file a return, and none was ever made (R. 148). If a penalty had been assessed, it would appear upon the books of the Collector the same as any other assessment (R. 148).

On April 27, 1923, A. B. Allen, then Collector at Omaha, wrote a letter to the Commissioner of Internal Revenue at Washington, calling attention to the additional assessment against the Updike Grain Company and additional assessments against other dissolved companies in which Mr. Updike was interested (R. 225), stating that he had had the matter up with Mr. Updike a number of times, but did not know how to proceed. He thereupon stated the facts respecting the dissolution of the corporations and the distribution of their assets among their stockholders during the month of August, 1917; that "it is claimed by the taxpayers that they made returns for the part of the year 1917 up to the time of dissolution, and paid the tax as determined up to that time"; that there is no property of the corporations which could be seized by distraint; that Mr. Updike seemed to think there were legal principles involved and a court decision that would constitute a defense, and asked if he might suggest to the taxpayers a reasonable compromise, although he did not know that the taxpayers would entertain the idea of a compromise.

On May 2, 1923, H. F. Mires, Acting Deputy Commissioner, answered the above letter (R. 229) stating that

inasmuch as some of the stockholders have died and there is no property of the corporations which could be seized by distraint, a collection could apparently only be made by suit; he was requesting the Solicitor of Internal Revenue to prepare an opinion on the matter.

On May 8, 1923, Collector Allen wrote to Mr. Updike (R. 343) advising him that the matter of the additional taxes of the dissolved corporation had been referred to the Solicitor of Internal Revenue for an opinion as to the liability of the stockholders.

On May 8, 1923, C. R. Nash, Deputy Commissioner, sent to the Collector at Omaha a copy of the opinion of the Solicitor of Internal Revenue, referred to above (R. 233), wherein it was stated:

> "It appears that all of these corporations were dissolved and the assets distributed among stockholders during the summer of 1917 and prior to the passage of the Revenue Act of 1917. The latter states that the corporations made returns for a fractional part of the year 1917 up to the time of distribution and paid the tax under the rates in force at that time. A later audit of the returns resulted in additional assessments due to the provisions of the Revenue Act of 1917, which were retroactive in application. Assuming that returns were filed in August, 1917, suit for the recovery of additional taxes for the year 1917 was barred in August, 1922, under the provisions of Section 250 (d) of the Revenue Act of 1921. As the corporations have been dissolved, warrant of distraint against the corporations cannot be enforced as against stockholders of the former corporations and unless the stockholders voluntarily submit an offer in compromise of the amount of the tax there is no means of enforcing liability.

> If the corporations have any property distraint will lie providing the assessment was made within the period of limitation as prescribed by Section 250 (d) of the Revenue Act of 1921."

Collector Allen immediately upon being advised that the right to collect taxes was barred, and that there was no means of enforcing the liability of the stockholders, conferred with Mr. Updike, but did not inform him of the opinion of the Solicitor of Internal Revenue that the tax was barred, and finally induced him to make an offer of settlement in the amount of $10,000, which the Collector stated was satisfactory, and that he would recommend same for acceptance by the Department. Thereupon he induced Mr. Updike to give him a check for $10,000, which he promised not to cash until the offer was accepted. The check, however, was cashed by the Collector shortly thereafter (R. 350, 351).

On June 5, 1923, the Collector wrote to the Commissioner (R. 279) transmitting the offer of compromise, and stating

> "due to the fact that suit for recovery for additional taxes is barred by the statute of limitations, I am recommending that this offer be accepted. This offer is being taken up in the regular way and will appear on my supplemental June 1923 list, account 540039."

When Updike discovered that the check had been cashed he made repeated requests of Allen for written evidence of settlement. Allen assured him that the claims were settled and that it would simply be a matter of routine to secure evidence of settlement (R. 351).

After other correspondence between the Collector and the Commissioner, Mr. Updike received a letter from the Commissioner dated February 12, 1924, stating that the offer had been rejected (R. 347).

On April 12, 1924, the Government instituted suit against Mr. Updike and other stockholders of the Missouri Valley Elevator Company to recover additional taxes assessed against that company under the October 3, 1917, Act, which company had likewise been dissolved in August, 1917, and was one of the companies included and referred to in all of the correspondence hereinbefore set forth. Returns had been filed for that company in the same manner as they had been filed for the Updike Grain Company (R. 349, 350). In that suit no claim was made that the Missouri Valley Elevator Company had failed to file "a required return" or "a return," but after alleging the facts, respecting the returns actually filed, the complainant charged "said returns were incorrect, misleading and false in law in the respects hereinafter set forth. (R. 355-367).

The Bureau of Internal Revenue, having knowledge of the facts respecting the returns of that company as hereinbefore recited, apparently was unwilling to base its delayed right to collect those taxes upon the ground that no return had been filed, but deliberately took the position, in the above Bill of Complaint, that a return had been filed, but that same was "false in law," in order to avoid the limitation provisions in Sec. 250 (d) of the Revenue Act of 1921.

Mr. Updike and the other defendants interested herein were again led to believe by this Bill of Complaint

that the Government was accepting the returns filed as the "required" returns for assessment of the tax imposed by the October 3, 1917 Act, but was only claiming that the returns were false in law because they did not have calculated thereon the correct amount of the tax as imposed by the October 3, 1917 Act. No claim had been made up to that time by any governmental official to any of these defendants that the Updike Grain Company, the Missouri Valley Elevator Company, or any of the other companies in which Mr. Updike was interested, which had been dissolved in the summer of 1917, came within the "no return" class, and no such claim was thereafter made until upon the actual trial of the Missouri Valley Elevator Company case in June, 1924, (R. 350 and 351) after that case had been prepared by the defendants upon the theory that the government was admitting that required returns had been filed, but was only asserting that same were false in law.

It never has been, and can not be, claimed by the Government that the returns filed for any of the companies were false or fraudulent or that any of the defendants were guilty of any fraud, actual or constructive, in any of the matters in controversy herein.

It has been intimated, but without any proof offered or capable of being produced, that the various companies in which Mr. Updike was interested were dissolved to evade taxes under the October 3, 1917 Act. This is not true, except to this extent, that the dissolutions were partly influenced by the unfair provisions of the Revenue Laws, existing at that time, compelling corporations

holding stock in other corporations to pay income taxes upon the dividends from such stock, which provisions were subsequently changed by Congress, because of the injustice of the same.

From all the facts and circumstances the conclusion is irresistible that the Commissioner accepted the returns made by the company covering the fiscal period ending June 30, 1917, which were filed in July, August and September, 1917, for the following among other reasons:

(a) The returns as filed by the Updike Grain Company set forth specifically the gross amount of income from all separate sources of said company for the year 1917 and for the eleven month period ending June 30th, 1917, and the aggregate items of allowance claimed by the company and authorized by law, and the total and entire net income and earnings of the company for such eleven month period and for the periods January 1, 1917 to June 30, 1917 and July 1, 1917, to the date of dissolution of the company in August, 1917, and all other facts, data and information appropriate and necessary to determine the net income and to carry out any applicable provisions of the Revenue Act of October 3, 1917.

(b) No notice, demanding additional returns, was sent to the company as required by Regulation 33, Article 196, supra.

(c) When the Commissioner requested the Revenue Agent in Charge at Omaha to make an audit of the books and records of the company to ascertain the amount of additional tax due, he requested him to audit the 1917 returns of the company which had been filed, and did not claim or advise that no return had been filed.

(d) The Revenue Agent making the audit for the year 1917 asked for, received and used the copies of the returns filed by the company for that year in making his examination and audit.

(e) The Revenue Agent in Charge and the Revenue Agent making the examination proceeded upon the theory that a return had been made, which their correspondence clearly indicates.

(f) In the report of the Revenue Agent making the examination, he refers to the computations for the year in question as an "*amended return,*" which designation was apparently accepted by the Commissioner, because it was upon the figures thus set forth that the Commissioner determined and assessed the tax.

(g) The Revenue Agent, making the examination and audit of the 1917 returns, prepared "a return" for the Commissioner pursuant to Sec. 14 (a), Revenue Act of 1916, both for the War Income and Excess Profits Tax under the October 3, 1917 Act.

(h) No penalty was assessed against the company for failure to file a return, which it was the duty of the Commissioner under the regulations and law to assess where no return had been filed, and had he not been accepting the returns filed as sufficient. (Sec. 1004, Rev. Act, 1917; Reg. 33, Art. 21; Reg. 33, Art. 197; Reg. 33, (Rev.) Art. 214, para. 629).

(i) In a letter dated April 27, 1923, from the Collector of Internal Revenue, Omaha, Nebraska, to the Commissioner of Internal Revenue, attention is called to this tax, and in that letter it is stated:

> "It is claimed by the taxpayers that they made returns for the part of the year 1917 up to the time of the dissolution."

(j) The Solicitor of Internal Revenue in his opinion of May 4th, 1923, recognized the fact that returns had been filed for the period in question.

(k) The Bureau of Internal Revenue and the Department of Justice, in the suit brought against Mr. Updike to recover the taxes assessed against the Missouri Valley Elevator Company, recognized that the returns filed by that company, which were of like character to the returns filed for the Updike Grain Company, were sufficient returns to start the running of the statute of limitations in cases where returns had been filed, had they not charged them to be "incorrect, misleading and false in law."

It appears from the foregoing that the returns filed by the company were recognized as sufficient under the October, 1917, Act, (1) by the Collector of Internal Revenue at Omaha; (2) by the Commissioner of Internal Revenue, in directing a revenue agent to make the investigation, who was empowered to do so only in cases where returns were made; (Reg. 33, Art. 186; Treas. Dec. 1932, para. 5; Reg. 33 (Rev.) Art. 221, para. 639; Reg. 45, Art. 1012) (3) by the Revenue Agent in Charge at Omaha; (4) by the Revenue Agent making the investigation and audit; (5) by the Solicitor for the Bureau of Internal Revenue; (6) by the Proving and Audit Divisions in endorsing the additional assessment on the return; and (7) by the Commissioner of Internal Revenue in making the assessment, as so endorsed; and (8) by the Department of Justice in the Missouri Valley Elevator Company case.

As a result of the foregoing the taxpayer, and likewise the former officers and stockholders, had the right to assume, and at all times did assume, that the returns as filed were sufficient. By the conduct of the various governmental officers recited above, the taxpayer and

the stockholders and transferees were lured and lulled into the belief and security that the company had complied with all the rules, regulations and laws respecting returns, for its income for the year 1917, and had thereby escaped any penalties or disadvantages imposed upon one not filing returns.

Argument Respecting Filing of Returns.

In the Missouri Valley Elevator Company case, in the absence of the proof put in evidence in this case, it was determined that there was no limitation upon the right of assessment and/or collection of the tax in that case because that company had not filed a "required return," and consequently said case came within the following provisions of Section 250 (d) of the Revenue Act of 1921:

> "That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file *a required return,* the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due."

Those provisions were carried into the Revenue Acts of 1924 and 1926, but with a very significant change. They appear in Section 278 (a) of both Acts in the following language:

> "In the case of a false or fraudulent return with intent to evade tax or of a failure to file *a return* the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

You will note the use of the phrase, "a return," in the 1924 and 1926 Acts, as distinguished from the phrase, "a required return," used in the 1921 Act. The limitation provisions in the 1924 and 1926 Acts supersede the limitation provisions in the 1921 Act, and therefore being the law at the time of the commencement of this action, the case must be decided in the light of the provisions of these later Acts.

The effect of this change in the phraseology came before the Board of Tax Appeals in the case of *Werbelovsky, Executor v. Commissioner,* 8 B. T. A. 442, acquiesced in by the Commissioner, Cum. Bull. VII-1, 33. This case involved taxes upon income from the estate of J. H. Werbelovsky for the calendar year 1917.

The executor, on April 1, 1918, filed a fiduciaries' income tax return, on Form 1041, for income for the calendar year 1917, showing no net income. The regulations promulgated by the Commissioner and approved by the Secretary of the Treasury, in force and effect at the time, permitted returns of such fiduciaries to be filed on Form 1041, if the income of the estate was less than $1,000, but further required that if the income of the estate was $1,000 or over, return should be filed on either Form 1041 or 1040-A. The Commissioner, upon later audit and review, found and determined the net income of the estate for the calendar year 1917 to be $192,570.71, and mailed the executor a deficiency letter, in which he notified him of a deficiency against the estate for the year 1917, of $46,419.74. The executor appealed to the Board of Tax Appeals and contended that the proposed de-

ficiency was barred by Section 275 (a) (2) of the Revenue Act of 1924, because the proceedings had been begun against him more than five years after "returns" had been filed. The Commissioner contended that in accordance with the Revenue Act of 1916, he was given authority, subject to the approval of the Secretary of the Treasury, to prescribe the form or forms to be used by all taxpayers in reporting their income; that pursuant to such authority, he with the approval of the Secretary, promulgated certain regulations providing that in all cases of reporting under section 2 (b) of the Revenue Act of 1916, as amended, a return should be filed on Form 1040 or 1040-A when the income of the estate, as an entity, was $1,000 or over; that no return had been filed on either Form 1040 or 1040-A; and that, therefore, in accordance with section 278 (a) of the Revenue Act of 1924 the tax in question could be assessed or a proceeding in court for its collection could be begun without assessment at any time. The Board of Tax Appeals held as follows:

> "We are of the opinion that both the assessment and collection of the tax here in question are barred by the statute of limitations. * * *
>
> "* * * Does the fact that the executor who filed the return for the estate did not include in such return certain income which the Commissioner has determined was income of the estate, but which the estate still denies was income, or the fact that the executor in filing 'a return of the income' used form 1041 instead of either 1040 or 1040-A place the estate in the position of having failed to file a return

within the meaning of the words 'or of a failure to file a return' as used in section 278 (a) of the Revenue Act of 1924? We think not. The estate did file a 'return.' The Commissioner has not alleged or contended that the return as filed was either a 'false or fraudulent return with intent to evade tax.' Under such facts and circumstances we fail to find any authority in section 278 (a) for the proposition that the taxes here in question could be assessed or a proceeding in court for their collection could be begun without assessment at any time.

"The respondent in effect is asking us to read into section 278 (a) the word 'required' as if the statute read 'or of a failure to file a required return.' This we cannot do. The word 'required' was in a similar provision of the Revenue Act immediately prior to the Revenue Act of 1924. See the second proviso of section 250 (d) of the Revenue Act of 1921, which reads:

"Provided further, that in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due.

"It must be assumed that Congress intended to omit the word 'required' in the latter act.

* * * *

"The Commissioner was put on notice that a return had been filed and was given five years to examine the return and determine whether any taxes were due. This he did not do until after more than two and one-half years after the five-year period had expired. We are, therefore, of the opinion that the assessment and collection of the taxes now proposed by the respondent are barred by the statute of limitations. Compare *Appeal of Mabel Elevator Co.*, 2 B. T. A. 517, and *Bastrop Mercantile Co., Let., v. Commissioner*, 7 B. T. A. 529."

In *Brewster v. Gage*, Dec. 6th, 1929, this court held:

> "The deliberate selection in a statute of language differing from that of earlier acts on the subject indicates that a change of law was intended."

The change in the phraseology was undoubtedly prompted by the settled policy of Congress,—as demonstrated by the various Revenue Acts enacted during the past ten years,—to extend the limitation provisions, respecting assessment and/or collection of income, excess-profits, and war-profits taxes, to all cases wherein the Government had obtained knowledge of an income through any return filed, whether or not same was upon any particular form of return, contained the correct gross or net income, contained a correct calculation of the tax, or failed to comply with other details respecting the law or regulations where the taxpayer was not guilty of any fraud. The courts and the Board of Tax Appeals have recognized and carried out that policy in their decisions, as will be hereinafter shown.

It must be conceded that if "a return" was filed either (a) by the taxpayer or (b) by the Commissioner of Internal Revenue, more than five years before this action was brought, the right to collect the tax is barred by Section 250 (d) of the Revenue Act of 1921, Section 277 (a) (2) of the Revenue Act of 1924 and Section 277 (a) (3) of the Revenue Act of 1926.

(a)

Was "A Return" Made and Filed by the Taxpayer?

The relevant provisions of the Revenue Acts of 1916 and 1917 are as follows:

Section 13 (b) of the Revenue Act of 1916 (39 Stat. 771):

> "Every corporation, joint-stock company or association, or insurance company, subject to the tax herein imposed, shall, on or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, or, if it has designated a fiscal year for the computation of its tax, then within sixty days after the close of such fiscal year ending prior to December thirty-first, nineteen hundred and sixteen, and the close of each such fiscal year thereafter, render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which the return is prepared, * * * All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue."

Section 3173 of the Revised Statutes of the United States, as amended by Section 16 of the Revenue Act of 1916 (39 Stat. 774):

the sudden enactment in close proximity to each other of the Revenue Acts passed September 8th, 1916, March 3d, 1917 and October 3d, 1917, imposing additional income, war income and war excess profits taxes, with their many varied and complicated provisions and department regulations, new to income tax laws. Even if this regulation were specific and unambiguous, the same does not have the force of a statute or even of a judicial determination as will be seen by the opinion in *Stieff vs. Tait*, 26 Fed. (2d) 489, (D. C. D. Md.), wherein it is held, as announced in the syllabus, as follows:

> "Regulations of the Commissioner of Internal Revenue, constituting merely interpretation of law by an administrative office, are of no more than persuasive authority and do not have the force of judicial determination."

Whether that regulation was ambiguous or not, the discretionary powers of the Commissioner gave him authority to interpret and even waive the requirements of that regulation as subsequently interpreted in the Missouri Valley Elevator Company case. Neither the Commissioner nor the Collector of Internal Revenue demanded new or additional return of the 1917 income. The revenue agent who audited the books prepared what he termed an "amended" return, which he states was not signed because there were no officers of the dissolved company at the time. But at no time did anyone assert that it was necessary for the taxpayer to go through the useless formality of filing another return, which would set forth no information additional to that contained in the returns already on file. We can only conclude from all the facts and circumstances in this case that the Commis-

sioner accepted and adopted the returns filed by the taxpayer as sufficient and effective for assessment of the additional tax specified in the October 3rd, 1917 Act. All of the officials having anything to do with the determination or calculation of the additional tax, designated the returns filed by the taxpayer as returns for the additional tax under the October 3rd, 1917 Act, and referred to the returns made up by the Revenue Agent in his report and upon the separate forms as "amended" returns and not as initial returns. Having indicated to the taxpayer and the former officers of the taxpayer that the returns filed by the taxpayers were being accepted and adopted by the Bureau of Internal Revenue as sufficient under the October 3d, 1917, Act, common honesty and justice require that the Government be estopped from endeavoring to place the taxpayer or the defendants in this case in the unfavorable position of the taxpayer who failed to file "a return."

Where estoppel depends upon the conduct of an officer having such wide discretionary powers as the Commissioner of Internal Revenue with respect to the matters involved, it applies to the Government in such cases the same as to any other litigant. In the case of *Dayton Airplane Co. v. United States*, 21 Fed. (2d) 673, (6th C. C. A.), it is said:

> "It is first to be observed that this contract and the actions under it were not made or taken by officers who must find in a statute clear authority for their every act. In such contracts with such an officer the public is dealing with an agent of known and limited powers. Once beyond these powers, principles of estoppel or fair dealing have no application against

"It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, (1) in case of a special tax, on or before the thirty-first day of July in each year, (2) in case of income tax on or before the first day of March in each year, or on or before the last day of the sixty-day period next following the closing date of the fiscal year for which it makes a return of its income, and (3) in other cases before the day on which the taxes accrue, to make a list or return, verified by oath, to the collector or a deputy collector of the district where located, of the articles or objects, including the amount of annual income charged with a duty or tax, the quantity of goods, wares, and merchandise, made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable. * * *"

Section 19, Revenue Act of 1916:

" * * * If the collector or deputy collector have reason to believe that the amount of any income returned is understated, he shall give due notice to the person making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated may increase the same accordingly. * * * "

Section 4, Revenue Act of 1917 (40 Stat. 302):

"That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred

and seventeen and every calendar year thereafter, by every corporation, joint-stock company or association, or insurance company, subject to the tax imposed by that subdivision of that section, except that if it has fixed its own fiscal year, the tax imposed by this section for the fiscal year ending during the calendar year nineteen hundred and seventeen shall be levied, assessed, collected, and paid only on that proportion of its income for such fiscal year which the period between January first, nineteen hundred and seventeen, and the end of such fiscal year bears to the whole of such fiscal year.

"The tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, except that for the purpose of the tax imposed by this section the income embraced in a return of a corporation, joint-stock company or association, or insurance company, shall be credited with the amount received as dividends upon the stock or from the net earnings of any other corporation, joint-stock company or association, or insurance company, which is taxable upon its net income as provided in this title."

Section 200, Revenue Act of 1917 (40 Stat. 302):

" * * * If a corporation or partnership, prior to March first, nineteen hundred and eighteen, makes a return covering its own fiscal year, and includes therein the income received during that part of the fiscal year falling within the calendar year nineteen hundred and sixteen, the tax for such taxable year shall be that proportion of the tax computed upon the net income during such full fiscal year which the time from January first, nineteen hundred and seventeen, to the end of such fiscal year bears to the full fiscal year; * * *"

Section 1004, Revenue Act of 1917 (40 Stat. 325):

"That whoever fails to make any return required by this Act or the regulations made under authority thereof within the time prescribed or who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this Act or fails to collect or truly to account for and pay over any such tax, shall be subject to a penalty of not more than $1,000, or to imprisonment for not more than one year, or both, at the discretion of the court, and in addition thereto a penalty of double the tax evaded, or not collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected, in any case in which the punishment is not otherwise specifically provided."

Section 1005, Revenue Act of 1917 (40 Stat. 326):

"That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

As heretofore shown, the taxpayer filed returns of its gross and net income for the fiscal period ending June 30th, 1917, which contained "such facts, data, and information" as were "appropriate" and "necessary to determine the correctness of the net income return." This was so determined by the revenue agent representing the Commissioner of Internal Revenue who audited the return. In the report of his audit, dated October 25th, 1918, he said:

"I visited the office of that corporation and made an investigation of its returns for the years 1913 to 1917 inclusive. * * * From all books and records avail-

able, it appeared that the full amount of gross income for each year was reported and no improper deductions taken."

It appears from the provisions of the Revenue Acts of 1916 and 1917 quoted above, that the Commissioner was given wide discretion respecting the form, contents and acceptance or rejection of returns made under both the 1916 and 1917 Acts, and in making and enforcing regulations respecting same. He was also possessed of wide powers under the general law. In Revised Statutes, Section 321, Chapter 223, found in Section 2, Chapter 1, Title 26 United States Code, his duties were defined as follows:

> "The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; * * "

The Commissioner could accept any kind of a list or statement the taxpayer may file as the return of the taxpayer. When he did so it then constituted the return of the taxpayer.

The record shows that in this case the Commissioner did accept the returns made by the taxpayer in July, August, and September, 1917, as its returns for assessment of the tax under the October 3d, 1917, law.

Although Regulation 33 (Revised), Article 61, was promulgated in January, 1918, it received no interpretation with respect to corporations, dissolved in 1917, having previously filed returns of their 1917 incomes, until the Missouri Valley case was determined.

Article 61 referred to above is as follows:

> "A corporation which was dissolved in 1917, prior to passage of war revenue Act of October 3, 1917, is subject to tax under the Act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the Act of October 3, 1917. (*Brady, et al. v. Anderson*, 240 Fed. 665). Corporations so situated will make a return on revised Form 1031, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have paid any excess profits tax under the Act of March 5, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the Act of October 3, 1917."

It is claimed that notwithstanding the law and regulations, existing at the end of the fiscal period June 30, 1917, required the company to file returns within sixty days thereafter, and imposed sever[illegible] penalties for any failure in that respect, this regulation imposed upon the company the duty of filing an additio[illegible]al return for the fiscal period ending June 30, 1917.

We are of the firm belief that such inte[illegible]retation is not justified by a reasonable and fair construc[illegible] of the regulation in the light of the facts and circumsta[illegible]es surrounding the situation. We appreciate the fact that this regulation was so interpreted in the Missouri Valley Ele-

vator Company case, but on account of the confusion over the issues in that case, we feel that the interpretation of that regulation did not receive the attention in that case that it might otherwise have had. We, therefore ask for a decision of this question by this court, and in doing so keep in mind the effective date of the regulation and the distinction between corporations dissolved in 1917, operating upon a calendar year basis, and those operating upon a fiscal year basis. The regulation was not promulgated until January 2nd, 1918, which date was more than four months after corporations operating upon a fiscal year basis ending June 30, 1917, had, and were required to file their returns, but in ample time to govern the returns of corporations dissolved in 1917, operating upon a calendar year basis, as their returns would not be due until March 1st, 1918. We must also bear in mind that the Act of October 3, 1917, merely increased the percentage of tax upon the subjects or items specified in the Revenue Act of 1916, consequently the Government would require no additional data upon which to calculate the tax than would be, and was in the instant case, set forth in returns upon the forms used under the 1916 Act.

An additional return, therefore, would give the Government no additional information necessary for calculation of the tax and would be imposing upon the taxpayer a useless and meaningless burden, for the neglect of which he would be subjected to the severe penalties attaching to a failure to file a return.

In analyzing this regulation in the light of the foregoing it will be noted that Article 61 does not specifically

distinguish between corporations operating under a calendar year basis and those operating upon a fiscal year basis, but by applying the rule of reasonable construction it is apparent that a second sentence was intended for corporations operating upon a calendar year basis only and the third sentence for those operating upon a fiscal year basis. A fair construction therefor is that corporations dissolved in 1917 which were operating upon a fiscal basis and which had previously made a return, were not required to file another return, as the returns made must necessarily set forth the data upon which the additional tax could be calculated. This regulation having become effective January 2, 1918, that part thereof requiring a return upon revised Form 1031 (revised January 1918), could well apply to corporations operating upon a calendar year basis, as their returns were not due until March 1, 1918. In the absence of a specific provision clearly imposing upon those corporations "having previously made a return" upon a fiscal year basis, the duty of filing a second return, it would seem that if the Commissioner intended that those corporations should make additional returns and suffer any penalties or loss of rights in the event of failure, it would have and should have been specifically so stated.

It should also be noted that the requirement in this article is to "make a return on Revised Form 1031." The form used by the company in making its return "covering the period in 1917 during which it was in business prior to its dissolution" was "Revised Form 1031," (See Ex. 7, p. 165 and Ex. 14, p. 197). It is true that the Revised Form 1031 used by the company in making its

return was Form 1031, (Revised October 1916) but the above article did not specifically state which revised issue of Form 1031 was required. It would seem reasonable and just that if the government was going to claim any advantage from a regulation that a failure to comply with might result in severe penalties upon the taxpayer, it should make that regulation more specific.

Before leaving this subject, we should direct attention to the fact that the regulations of the Bureau of Internal Revenue in both 1917 and 1918 required corporations to file two returns for each tax period, one designated as an "Income Tax Return" which was Form 1031, and the other designated as an "Excess Profits Tax Return" which, for the year 1917, was on Form 1095, and for returns made in 1918 was upon Form 1103. It will be noted that Article 61, Regulation 33 (Revised) did not require any additional Excess Profits Tax Returns, consequently it must have been intended to accept any excess profits tax return, that had been filed by a dissolved corporation in 1917, as sufficient under the October 3, 1917 Law, as there was no regulation requiring the taxpayer to file an additional excess profits tax return upon Form 1095, Form 1103, or upon any other form. The Excess Profits Tax Return, Form 1095, already filed, was thereby declared to be sufficient, and as this represented $362,498.70 of the total alleged deficiency, the alleged deficiency to that extent, at least, is clearly barred.

In considering the good faith of the taxpayer and respondents, we should remember that much confusion necessarily resulted among all taxpayers, as a result of

his principal. Here the scope of the contract is not limited by any statute. The government was acting by the Secretary of War, in a national emergency of the first class. His discretion was unlimited; it must be exercised through subordinates; in the absence of fraud or bad faith, the exercise of such delegated authority is the Secretary's exercise of it. Rules of estoppel and fair dealing apply in full force as with individuals. In this class of contracts, and for effect on future emergencies, if for no other reason, a sound public policy must require that the government keep its contracts and stand by its settlements as an individual must. In that atmosphere the questions of this case are to be approached."

See also *The Falcon*, 19 Fed. (2d) 1009.

That the Commissioner's acceptance of a return need not be formal but may be shown by conduct, is sustained by General Counsel's Memoranda No. 1682-VI-22-3250, in an analogous matter, wherein the Commissioner was insisting upon the validity of a waiver unsigned by the Commissioner extending the time for collection of a tax that otherwise would have been barred by the Revenue Act of 1924. Section 278 (e) of the Revenue Act of 1926 provides that Section 278 shall not authorize the assessment of a tax or the collection thereof, if at the time of the enactment of the 1926 Act such assessment or collection was barred, "unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto." The waiver relied upon by the Commissioner was signed by the taxpayer, but was not signed by the Commissioner, and the taxpayer challenged the effectiveness of same for that reason. The General Counsel, in passing upon that question, said:

"This office is therefore of the opinion that the validity of a waiver or agreement by a taxpayer that the statute of limitations with respect to collections shall be waived, which was executed by the taxpayer prior to the enactment of the Revenue Act of 1926, is not affected by the absence of the Commissioner's signature where the Commissioner has otherwise indicated his acceptance of the taxpayer's offer to waive the statute of limitations by reliance on, or parol acceptance of, the waiver in its terms."

Returns, to start the running of the statutes of limitations, in the various tax laws, do not have to be letter perfect. A taxpayer, making a good faith return upon a fiscal year basis ending July 31st, 1918, when it should have made its return upon a calendar year basis, cannot be assessed five years after such return was made, on the ground that no return was made, although the return filed was not in strict compliance with the law, and the Commissioner had *demanded* a return on a calendar year basis, which the taxpayer had neglected to file.

United States v. Mabel Elevator Co., 17 Fed. (2d) 109; (D. C. Minn.)

Bastrop v. Commissioner, 7 B. T. A. 529, acquiesced in by Commissioner, Cum. Bull. VII, 1, p. 3.

The filing of an amended return does not interrupt the running of the statute of limitations, but same is held to start running from the filing of the original return, although there may have been a wide discrepancy between the two returns, if there was no fraud.

Franklin v. Commissioner, 7 B. T. A. 636, Acquiesced in by Commissioner, Cum. Bull. VII, 1, p. 11.

Shanley v. Commissioner, 7 B. T. A. 521.
Lancaster Lens Co. v. Commissioner, 10 B. T. A. 1153.

Appeal of National Refining Co., 1 B. T. A. 236.
Lawrence v. Ham, 19 Fed. (2d) 643 (D. C. Me. S. D.)

An unsigned work sheet on Form 1040-A prepared by employes in the office of the Collector of Internal Revenue for a person who could neither read nor write any English, except his signature, but which was accepted by the collector, and a tax assessed thereon has been held to be a return for the year 1919.

Belowsky v. Commissioner, 7 B. T. A. 424.

A corporate return for a fiscal year ending June 30, 1919, which was signed by the Vice President and Secretary, instead of by the Vice President and Treasurer or Assistant-Treasurer, as the law and regulations then required, was held to be in substantial compliance with the statute and to constitute the return "required" by law, and in discussing this question the Board of Tax Appeals said:

> "So far as disclosed, the respondent never at any time prior to the hearing of this appeal made objection to the form or manner in which said document was executed, nor ever at any time requested the petitioner to file a return verified by the affidavit of its treasurer or assistant treasurer.
>
> * * *
>
> "The statute provides that every corporation subject to taxation shall make a return, stating specifically the items of its gross income and the allowable deductions and credits, and further provides that the return shall be sworn to by the president,

vice president, or other principal officer and by the treasurer or assistant treasurer.

"What is the essence of the thing required to be done by this statute? It is, we think, the making of an honest return by the corporation, wherein are set forth specifically the items of its gross income and the allowable deductions and credits, in order that the Commissioner may determine the correct amount of its tax liability. If such required information is fairly and honestly given in a return sworn to by officers of the corporation who are familiar with its affairs, this in our opinion constitutes a substantial compliance with the provisions of the statute.

"The prime object of the legislative intention was manifestly to require that the specified information be furnished under oath by the corporate officers, and where such information is fairly and honestly given in a return sworn to by the vice president and secretary of the corporation the legislative purpose is achieved in no less degree than if the return had been sworn to by the vice president and treasurer or assistant treasurer.

"A general rule of statutory construction is that those provisions which do not relate to the essence of the thing to be done, and as to which compliance is a matter of convenience rather than substance, are directory; while those provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory. 25 R. C. L. 767.

"In Mabel Elevator Co., 2 B. T. A., 517, we said:

"There can be no doubt that such limitations are placed on assessments for the purpose of assuring the taxpayer, who has made an honest return, that after such period his tax liability will not be reopened; otherwise the business of the country would always have before it the threat of additional taxes against the income of years long past whenever a

new theory for interpreting the tax law or for the application of accounting principles occurred to the taxing authorities. If the limitation can be avoided on the plea that the return filed was not such a return as is required by law, although filed in good faith, there is no such assurance for the taxpayer and the limitation becomes of doubtful value at least. If the statute requires any interpretation great weight must be given to the purpose which it was obviously intended to accomplish.

"Again, in Colmer-Green Lumber Co., 12 B. T. A. 256, we said:

> 'The period of limitation prescribed by the statute is one of repose and it should not lightly be construed to permit the respondent to reopen cases upon the ground that the return filed in good faith was not the return required by the statute.'

"In F. A. Hall Co., 3 B. T. A. 1172, a consolidated return was filed for the taxpayer and an associated company, sworn to by the individual who was the treasurer of both companies. The Commissioner contended that separate returns should have been filed, and that the consolidated return filed was not the return required by law; hence, the statute of limitations did not apply. Since it appeared that the consolidated return specifically stated the items of gross income and the items of deductions of the taxpayer, we held that it constituted a substantial compliance with the provisions of section 239 of the 1918 Act, *Supra,* respecting the making of returns, and was sufficient to start the running of the statute of limitations embodied in section 277 (a) (2) of the 1924 Act, *supra.*

"Under the theory contended for by the respondent in this case, if a corporation had no treasurer or assistant treasurer, or if such office was vacant through resignation, death or otherwise at the

time of making its tax return, such facts would operate to place the corporation beyond the purview of the statute of limitations, and would deny to it the right of any benefit thereunder. We are not persuaded that this was the intention of Congress.

"The good faith of the petitioner in making the return involved herein is not questioned by the respondent, and said return specifically stated the items of its gross income and the allowable deductions and credits. It is our opinion, therefore, that said document constituted the return required by law. More than five years having elapsed subsequent to the filing of said return and prior to the mailing of the deficiency notice, it follows that assessment and collection of the proposed deficiency are barred by limitation."

Indiana Rolling Mills Co. vs. Commissioner, 13 B. T. A. 1141.

The filing of a consolidated return on behalf of a group of associated corporations, which was neither false nor fraudulent, has been held to be the return of each of said corporations and sufficient to start the running of the limitations in Section 277 (a) (2) of the Revenue Act of 1924, although the corporation later filed separate returns.

Kellogg Commission Co. vs. Commissioner, 6 B. T. A. 771, Acquiesced in by Commissioner, Cum. Bull. VII, 1, p. 17.

Fibre Container Co. v. Commissioner, 9 B. T. A. 575, Acquisced in by Commissioner, Cum. Bull. VII, 1 p. 10.

Appeal of F. A. Hall Co., 3 B. T. A. 1172, Aquiesced in by Commissioner, Cum. Bull. VII, 1, p. 13.

Appeal of National Tank & Export Co., 3 B. T. A. 1217.

I. T. 2451—Int. Rev. Bull. VIII-4-4082.

A consolidated return filed in good faith by the taxpayer, which separately showed the assets and liabilities of each corporation, but did not show separately the items of income and deductions applicable to each corporation, has been held sufficient to start the running of the Statute of Limitations, although separate returns should have been filed.

Colmer-Green Lumber Co., 12 B. T. A. 256.

The filing of a consolidated return by several corporations, where separate returns should have been filed, has been held to start the running of the Statute of Limitations and to substantially conform to the statute requiring returns, notwithstanding the consolidated return did not set forth sufficient details to accurately compute the tax against each corporation, and in connection with that holding the Board of Tax Appeals said:

> "The rule which the Board has laid down in cases similar to the instant case, if there can be said to be a rule governing all cases, is that there must be a 'substantial' compliance with section 239, *supra*. What constitutes a substantial compliance must necessarily vary according to the circumstances in each individual case. To require a literal compliance with Section 239, *supra*, such as the respondent would have us do, would relegate the limitations provisions of the statutes to the discard." • • •

"Where a consolidated return has been prepared and filed in good faith, and the names of the companies included in the consolidation are made clear to the respondent, and all of the 'items of gross income and the deductions' are included therein, although said items of income and deductions may not be in sufficient detail to enable the respondent to accurately compute the tax against each of the companies, there is a 'substantial' compliance with the statute."

Stetson & Ellison v. Commissioner, 11 B. T. A. 397.

The corporate taxpayer kept its books upon a fiscal year basis ending January 31, but filed its returns on a calendar year basis for the years 1918 and 1919. The returns filed June 5th, 1919, and February 24th, 1920, on the calendar year basis gave the Commissioner of Internal Revenue information as to the entire period covered by the fiscal year ending January 31, 1919, and it was held that the return filed February 24th, 1920, started the running of the Statute of Limitations upon the collection of a deficiency in the tax for the fiscal year ending January 31, 1919, and that proceedings to collect the tax begun more than five years after that date, were barred by Section 277 (a) (2) of the Revenue Act of 1924.

Lowenstein Bros. Garment Co. 13 B. T. A. 446.

See Also:

Paso Rables Mercantile Co., 12 B. T. A. 750.

Willingham L. & T. Co., 15 B. T. A. 931.

The erroneous computation of the tax by a taxpayer upon a return made upon a calendar year basis instead of upon a fiscal year basis does not destroy the effect of the return, in starting the running of limitation provisions.

Appeal of Washburn, 7 B. T. A. 438, acquiesced in by Commissioner, Cum. Bull. VII, 1, p. 33.

The entire failure of the taxpayer to compute the tax upon the return does not destroy the effect of the return, for the same purpose.

Conrad Hardware Co. vs. Commissioner, 8 B. T. A. 512. Acquiesced in by Commissioner, Cum. Bull. VII, 1, p. 7.

In the Conrad Hardware Company case, the taxpayer filed a return for a fiscal period ending in 1920 upon Form 1120-A, which was intended to cover fiscal years ending during a year prior thereto, and did not contain items for a correct computation of the tax under the 1918 Act. These items were left blank by the taxpayer. The collector did not forward this return to the Commissioner of Internal Revenue, but returned same to the taxpayer with Form 1120, requesting that the taxpayer's return be made upon the other form. The taxpayer retained the first return and filled out the second return, upon which he calculated the tax and then filed it with the collector. After five years from the filing of the first return, but within five years from the filing of the second return, the Commissioner proceeded to assess and collect a deficiency. The Board of Tax Appeals held that the five-year period

prescribed in Section 250 (d) of the Revenue Act of 1921 started to run from the date of the filing of the first return, and in that connection said:

> "The Commissioner insists that because the return executed October 26, 1920, and transmitted to the collector for filing and received and stamped by the collector, was not retained by him, it was not 'filed' and did not operate to start the running of the statute of limitations within which assessment and collection of any tax for the fiscal year ending August 31, 1920, might be made. He says that this return was not received by him and that he cannot be charged with knowledge that it was received by the collector; that he could not examine the return as required by section 250 of the Revenue Act of 1918 because it was never in his custody. * * * The collector should not have sent the return back to the petitioner. All that remained to be done upon the return which the petitioner filed was to compute the tax at the rates provided by the Revenue Act of 1918, upon the net income shown in the return. While there is no direct evidence on this point, it would appear probable that the reason the collector sent the first return back to the petitioner was because it had been made on a form which contained in 'Schedule V—Computation of taxes' rates to be used in determining the amount of tax for a fiscal year beginning in 1918 and ending in 1919, and that evidently accounts for the fact that petitioner did not make a computation of the tax upon this return. The running of the statute of limitation, however, does not depend upon whether the taxpayer computed the tax upon the income shown on the return made to the collector. The fact that the return is inaccurate or that it is filed on a calendar year instead of a fiscal year basis does not postpone the date on which the statute of limitation begins to run. See *Appeal of Mable Elevator Co.*, 2 B. T. A. 517; *United States vs. Mable Elevator Co.*, 17 Fed. (2nd) 109."

It has been further held that the filing of a joint return by husband and wife as required by treasury regulations then existing, started the running of the statute of limitations upon a deficiency against the wife, notwithstanding the husband and wife later filed separate returns to take advantage of a right subsequently granted to file separate returns, whereby the amount of their taxes would be reduced.

Thomas v. United States, 22 Fed. (2nd) 1000 (D. C. N. D. Tex.)

All of the above holdings are in keeping with the principle announced in *Tucker vs. Alexander,* 25 Fed. (2d) 425, wherein it is said:

"Substance and not form must govern in constructing and applying income tax laws."

Citing *U. S. vs. Phellis,* 257 U. S. 156.

(b)

Was "A Return" Made and Filed by the Commissioner of Internal Revenue?

Section 14 (a) of the Revenue Act of 1916 (39 Stat. 772):

"* * * That every corporation, * * * computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within one hundred and five days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, * * * in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due,

make a return upon information obtained as provided for in this title or by existing law; * * * *Provided,* That upon the examination of any return of income made pursuant to this title, * * * if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes;"

Section 14 (b) of the Revenue Act of 1916 (39 Stat. 772):

"When the assessment shall be made, as provided in this title, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue * * * "

The same authority to the Commissioner to make returns is found in various regulations in force at the time the Commissioner made returns in the instant case, particularly in the following:

Regulation 33, Article 177.

Regulation 33, Article 184.

Regulation 33 (Revised), Article 42, Paragraph 253.

If it is claimed that the returns made and filed by the taxpayers were not accepted or adopted by the Commissioner as returns under the October 3d, 1917 Act, and for the assessment of the additional tax under said Act, then we contend that the returns prepared by the Commissioner of Internal Revenue through the revenue agent and revenue agent in charge at Omaha in October, 1918,

and forwarded to the Commissioner of Internal Revenue by the revenue agent in charge under date of October 26th, 1918, and stamped "Return Audited," was "a return" within the meaning of Section 278 (a) of the 1924 and 1926 Acts. Such returns were not required to be subscribed by the Commissioner at the time same were made and filed, as was the case of returns made by the collector or deputy collector of Internal Revenue, or as was afterwards required with respect to returns made by the Commissioner.

Other Limitation Provisions.

If it is claimed that this case does not come within the provisions of Section 277 or Sections 278 of the Revenue Act of 1926, then it must be governed by Section 1109 (a) (1), (2) and (3), (44 Stat. 114), which is the dragnet limitation section intended to cover all cases for which there is no specific provision. The sub-divisions of this section are as follows:

"(a) Except as provided in sections 277, 278, 310 and 311—

"(1) Notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, all internal-revenue taxes shall (except as provided in paragraph (2) or (3) of this subdivision) be assessed within four years after such taxes became due, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes became due.

"(2) In case of a false or fraudulent return with intent to evade tax, of a failure to file a return within the time required by law, or of a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.

"(3) Where the assessment of any tax imposed by this Act or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (A) within six years after the assessment of the tax, or (B) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

III.

The lawful distribution of the assets of a corporation in August, 1917, when no debts, or obligations of any kind then existing, remained unpaid, could not become unlawful by subsequent legislation. A subsequent creditor, even when the creditor is the government, cannot question a lawful distribution by a corporation to its stockholders, whether of dividend or of capital.

It is alleged, both in the petition and in the answer, (R. 9-13), that in August, 1917, before the passage of the law in question, this corporation by due action of its stockholders had decided upon the formal dissolution, and had arranged for converting its assets into money for convenient distribution, and in the language of the plaintiff's bill, (R. 10) its assets were "forthwith and prior to the date of its formal dissolution by it, distributed among its stockholders, the above named defendants, ratably according to their stockholdings of its shares of stock."

It is alleged in the answer and shown in the evidence that at the time this distribution was made, all the debts and taxes of every kind had been paid, so that on the first day of August, 1917, the corporation was not indebted to any existing creditor, whether on a matured or inchoate debt of any kind. The distribution of assets was lawful as against all existing claimants, because they were all paid.

There is no claim that the stockholders were liable on any liability created by state statute. There were no unpaid stock subscriptions. There was no state law, imposing a liability on stockholders for non-compliance,

which had not been fully complied with. Conversely, the Revenue Acts nowhere make the stockholders of any corporation personally liable for corporate tax.

There is, therefore, no theory of liability which can apply to these defendants, except that which regards them as voluntary transferees, liable as such under state or general law.

The position of the Government in this suit, therefore, is that of a subsequent creditor, seeking to set aside a prior transfer of property upon the ground that it was unlawful. There is no warrant of law for maintaining such a claim. It is well settled that as against a distribution of property by a corporation, whether by way of dividend or of capital assets, only existing creditors can enter their protest and enforce it by legal proceedings. Subsequent creditors who become such after the distribution of assets have no standing in a court of equity to complain of the lawful actions which took place before their claim came into existence.

And this is true, even though it should be held by this court that a lawful tax was levied upon the corporation as such, and that the corporation as an entity, having whatever projected existence might be given to such a corporation after its dissolution, became technically liable to the payment of the tax by the subsequent legislation and the subsequent assessment of a tax against it under such subsequent statute.

The case in that respect is precisely analagous to that of an individual who for any cause might give away

his property or distribute it among his relatives at a time when he is not indebted to any one and is not contemplating any debt. If he should subsequently become indebted or, as in this case, if legislation should subsequently create against him a liability for a tax, which as we shall see in the case of the income tax is purely a personal obligation and is not a tax *in rem* against any property, this personal obligation cannot be satisfied out of the property which he had transferred in good faith before the obligation came into existence. This rule as to individuals has been expressly held by this court to be applicable to corporations. In such cases this court has rejected the so-called "trust doctrine" by which alone the property of a solvent corporation can be deemed to be held in trust for future creditors.

In the case of *Graham v. Railroad Company*, 102 U. S. 148, the court holds that the disposition by a corporation of any of its property cannot be questioned by subsequent creditors of the corporation any more than a like disposition of property by an individual can be.

In this case it was charged that the corporation had indirectly sold its property to its directors or officers for an inadequate consideration and that in any case the transfer was technically voidable. The suit was brought by a subsequent creditor to subject the property to a judgment upon a claim arising subsequent to the transfer of the property. After announcing the rule that the creditor of an individual cannot question transfers taking place before the inception of the debt, the court holds that the same rule applies to a corporation. It was contended

by the creditor that the doctrine of the trust fund would apply to such a case, but the court says:

> "We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.
>
> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

In the case of *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, in holding that simple contract creditors could not maintain a bill in equity to satisfy their claims from the property of a corporation, the court again discusses the doctrine of the trust fund and holds that it has no existence when applied to a corporation which is

solvent at the time of the transaction under attack. The trust arises only when the corporation is insolvent and is being administered in equity for the benefit of its creditors. The court cites with approval the opinion in *Graham v. Railroad Company,* quoted above. In addition, it says:

> "In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockohlder, who, though equitably interested in, has no legal right to the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

Again the court says:

> "A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud or sometimes even mere mismanagement in respect thereto; but as between itself and

its creditors the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor, in any other sense than does an individual debtor. * * * Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

In *Leudecke v. Des Moines Cabinet Co.*, 140 Ia. 223; it is said of the so-called trust doctrine in relation to the assets of a solvent corporation:

"While at one time quite generally adopted in this country, it is now believed to be unsupported to its full extent by any considerable number of courts. Indeed, the court which first announced it has largely receded from its former position, and now says that no trust in its true sense exists; that all that was intended by the previous expressions was to announce the existence of an equitable right, which will be enforced whenever a court of equity, at the instance of a proper party, has taken possession of its assets,"

citing in support of this position the case of *Hollins v. Coal Co.*, 150 U. S. 371, cited above.

The Iowa court further says:

"We have recently gone over this matter in the case of *State Trust Co. v. Turner*, 111 Iowa 664; 82 N. W. 1029, and have repudiated the trust-fund doctrine as broadly announced in some of the earlier cases in this country."

But the Iowa court held in the case before it in favor of a pre-existing creditor, that a transfer of all the assets of the company was subject to the claim of such

creditor and in a suit in equity to enforce his claim, he was entitled to a lien upon such transferred assets.

In *McDonald v. Williams,* 174 U. S. 397; this court held that the receiver of a national bank cannot recover back from a stockholder a dividend paid him although it was paid out of the capital, and was paid prior to the appointment of a receiver, when such stockholder receiving such dividends acted in good faith, believing the same to be paid out of the profits made by the bank, and the bank at the time of the payment of the dividend was solvent.

In this case there was a distribution of capital under the pretense of paying a dividend which had not been earned. But the bank was solvent, and although it subsequently became insolvent and was placed in the hands of a receiver representing, of course, subsequent crditors, such receiver had no standing to recover back the assets from the stockholder.

The court cites in support of its decision the case of *Graham v. Railroad Company,* 102 U. S. 148, which we have already cited, and *Hollins v. Brierfield Coal & Iron Company,* 150 U. S. 371, cited above, and says:

> "These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.
>
> "The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the

bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

"It is contended on the part of the complainant, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as yet unknown to anybody, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however, the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it bona fide and for value. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say that if such a dividend be recoverable, it would be on the principle of a trust fund.

"Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. * * * Although no

trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is even in such case may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

"Hence, it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different principles than in a case of solvency. * * * The fact of insolvency must be proved in order to show the act was one committed in contempation thereof."

In *Sexton v. Wheaton,* 8 Wheaton 229; the leading case on the rights of subsequent creditors, this court held that a post-nuptial voluntary settlement made by a husband, who is not indebted at the time, upon his wife, is valid against subsequent creditors, holding that the Statute 13 Eliz. c. 5, then in force, avoids all conveyances not made on a consideration deemed valuable in law, as against previous creditors, but does not apply to subsequent creditors if the conveyance is not made with a fraudulent intent. Chief Justice Marshall, in his opinion, points out that the bill does not charge the husband was indebted when the conveyance was made, and the fact that he subsequently was insolvent is no ground for assuming that he was in that condition at the time of the conveyance, and says:

> "It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law."

The court then discusses the statute against fraudulent conveyances above cited and holds that the courts have considered every conveyance not made on consideration admittedly valuable in law as void against previous creditors, and this application to subsequent creditors has been in doubt in some cases, which the court then proceeds fully to analyze with the result of holding that a subsequent creditor whose claim was not in contemplation at the time of the transfer has no standing to question the conveyance.

In *Mattingly v. Nye,* 8 Wall. 370; an identical case was decided in the same way, the court holding that a settlement by a husband for his family was unaffected as to subsequent creditors by the statute against fraudulent conveyances, unless fraud was intended at the time of the transfer; citing *Sexton v. Wheaton,* 8 Wheaton 229, and suggesting that the whole learning of the law upon this subject is so fully developed in that case that further discussion is unnecessary.

In *Lawrence v. Greenup,* 97 Fed. 906, 6th C. C. A., the opinion is by Mr. Justice Lurton and it was concurred in by Justices Taft and Swan. The holding of the court is clearly stated in the syllabus, which is as follows:

"Under the decisions of the courts of the United States, a solvent corporation does not hold its capital or property subject to any trust in favor of its creditors, although it is in process of liquidation.

"The receiver of a national bank cannot recover from a stockholder, in an action at law, a sum received by him on a partial distribution of the capital of the bank, made and received in good faith during voluntary liquidation, when the bank was at the time solvent, and retained sufficient assets to pay all its liabilities, although it subsequently became insolvent."

Of course these ancient cases are the leading cases on this question and have never since been challenged in any subsequent decisions in the Federal or state courts; and they apply to the case now before the court.

The decisions of the Supreme Court of Nebraska are in line with the Supreme Court of the United States on the trust fund doctrine.

In *Shaw v. Robinson & Stokes,* 50 Neb. 403, the Nebraska court held that there is no general rule that the assets of a corporation are held in trust for its creditors and that even when it is insolvent it has a right to prefer some of its creditors over others, which of course it could not do if the property were held in trust for all creditors in any specific sense. In reaching this conclusion, the Nebraska court quotes with approval the decision in *Hollins v. Coal Company,* 150 U. S. 371, cited above, and states that it approves the ruling announced in the case of *Hospes v. Northwestern Manufacturing Company,* 48 Minn. 174; where it is said:

"The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it the same as a natural person. It is a trustee for its creditors in the same sense, and to the same extent as a natural person, but no further."

It is to be noted that none of the statutes providing for income or excess profit taxes makes the taxes a lien upon the property of the taxpayer, but each of them contains a clause to the effect that all of the provisions of the general revenue law for the collection and enforcement of taxes are available, and Section 3186 of the Revised Statutes provides that taxes become a lien upon the property of the taxpayer only when the assessment list is received by the Collector.

In the following recent cases, under varying state statutes, enacted upon the basis of the statute of 13th Elizabeth, it has been held that creditors not existing at the time of the transfer by individuals of their property to voluntary transferees, without consideration, cannot set aside the transfer by a creditor's bill, or pursue the assets by any form of proceeding, where the creditor's claim did not exist at the time of the claim. *Old Grove Church v. Rice,* 162 Ky. 525; *Clement v. Bank,* 115 Tex. 342; *Washington Bank v. Beatty,* 77 N. J. E. 252; *Farmers Bank v. Daiker,* 166 Ia. 728; *Coulter v. Meining,* 143 Minn. 104; *Crowley v. Brower,* 201 Ia. 257; *Parker v. Hand,* 299 Ill. 420; *Powell v. Gallivan,* 44 R. I. 453; *Aldrich v. Van Hemert,* 205 Ia. 460.

The ruling in those cases is not announced as a new or untried principle of law, but referred to through-

out the discussion in the decisions as well settled and long established.

And in recent decisions of the United States courts, the foregoing rule has been made applicable to transfer by corporations of their assets to their stockholders. *Radcliffe v. Clendenin,* 232 Fed. 61 (8th C. C. A.); *Sweet v. Lang,* 14 Fed. (2d) 762 (8th C. C. A.); *Wood v. Bank,* 24 Fed. (2d) 661 (2d C. C. A.).

In 1884 this court held, in a case arising under Nebraska law, *Horbach v. Hill,* 112 U. S. 144, that a creditor cannot, by a creditor's bill, successfully attack and set aside a conveyance of the debtor made at a time prior to the existence of the creditor's claim, this court saying that, "Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud."

IV.

The act of October 3rd, 1917, does not authorize a levy of taxes for incomes and excess profits upon stockholders of corporations existing during a portion of the year, where such corporations were dissolved, and had wound up their affairs, paid all existing obligations and distributed all their property among their stockholders prior to the passage of the act.

The statute is Chapter 63, Volume 40, Part I, United States Statutes at Large, Pages 300-338. Title I provides for an increase in the income taxes in the Act of September, 1916, Title 2 provides for the war excess profits tax and repeals the Act of March, 1917. Other titles in the Act provide for taxes on beverages, tobacco, public utilities and insurance, war excise taxes on admissions and dues, stamp taxes, estate tax, and an increase in postal rates, and amends in many respects the administrative provisions of the preceding income tax statutes. Its concluding section (page 338) is as follows:

> "Sec. 1302. That unless otherwise herein specially provided, this Act shall take effect on the day following its passage."

It was passed October 3, 1917. In Section 200, page 302, occurs the following language:

> "The term 'taxable year' means the twelve months ending December thirty-first, excepting in the case of a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year. The first taxable year shall be the year ending December thirty-first, nineteen hundred and seventeen, except that in the case of a corporation or partnership which has fixed its own fiscal year, it shall be the fiscal year ending during the calendar year nineteen hundred and seventeen."

When this statute came before the Commissioner of Internal Revenue for construction and enforcement, the first holding there was to the effect that it did not apply to dissolved corporations. By letter written by Deputy Commissioner L. F. Speer, to two taxpayers in New York, dated October 7, 1917, it is held that a corporation dissolved in June, 1917, was subject to tax under the Act of September, 1916, and under the Act of March, 1917, but would not be subject to the tax imposed by the Act of October 3, 1917, for the reason that the Government cannot revive a dead corporation in order to assess taxes which are imposed by laws enacted subsequent to the dissolution of the corporation.

But by letter of November 17, 1917, signed by Commissioner D. C. Roper, this ruling was reviewed and it was held upon the authority of *Brady v. Anderson*, 240 Federal 665, that a corporation which was dissolved during the year 1917, prior to the approval of the Act of October 3, 1917, is subject to the taxes imposed by that Act. It was held that such corporation should file a return in accordance with the provisions of the later Act and pay the taxes imposed by it.

The dissolution of a corporation under Nebraska law and its status upon dissolution.

The statutes of Nebraska provide that corporations may be organized by any number of persons for the transaction of any lawful business by adopting articles of incorporation, setting forth certain of the powers and limitations of the corporation, and filing the articles in the office of the Secretary of State and the County Clerk of the county where the business is to be conducted, and

publishing a notice in a newspaper for a period of four weeks. (Chap. 12, Art. 2, Compiled Statutes of Nebraska, 1922.)

The provisions for the dissolution of solvent corporations are contained in the following sections of the Nebraska statute, found in the Compiled Statutes of Nebraska for 1922, but in operation prior to and during the year 1917:

> "Sec. 468. No corporation can be dissolved by the members thereof except by consent of two-thirds of all its members, which consent must be entered on its records, unless a different rule has been adopted in its articles of incorporation."

> "Sec. 700. Each domestic corporation in case of dissolution or revocation of its charter shall file with the Secretary of State a certificate of such dissolution or revocation of its charter; in case of dissolution by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation. * * *"

Other portions of the statute following the above sections provide that in the case of dissolution, the title of any property remaining in the corporation at the time of its dissolution becomes vested in the directors, who are made trustees, and who are charged with the duty of paying the debts and meeting the obligations existing against the corporation at the time of its dissolution. These provisions have no application to the case of the corporation we are considering, for the reason that all the obligations of this corporation, including taxes arising under the Act of March, 1917, and the prior Acts, had been fully satisfied, and all the assets remaining after such payment were

distributed among the stockholders, so that the trust provided for by the statute never arose in this case. But, even if it had, it would have ceased to exist before the passage of the Act, because the trustees are created by statute, no order of any court is invoked for their appointment, and they do not remain in office until discharged by the court; the termination of the trust would of itself terminate their trusteeship.

The nature of the income tax. It is a personal tax, not a tax in rem.

It becomes important in this connection to consider the nature of the income tax, whether it is a tax upon property or a tax upon a taxpayer with respect to income received by him during a specified period.

The question here is not whether the tax is direct or indirect. In *Pollock v. Farmers Loan & Trust Company*, 157 U. S. 429, 158 U. S. 601, in which the income tax law of August 15, 1894, was held invalid, the controversy was whether the income tax is a direct or indirect tax. But this distinction is not the same as between a specific tax upon property and a tax upon a taxpayer. Capitation taxes are also direct taxes, but they are not specific taxes levied *in rem* upon the property itself.

In *Brady v. Anderson*, 240 Federal 665, the Circuit Court of Appeals held that the tax was personal and not *in rem*:

> "In our opinion the tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. The statement that the tax is upon this income does

not create an obligation *in rem*. It is only a way of saying that the owner is taxable with reference to the income. Taxable persons are spoken of throughout the act."

Likewise, in *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, in holding that under the terms of the income tax law of 1913, income held by a trustee for the benefit of unborn and unknown beneficiaries was not taxable, this Court said:

> "There must have been a taxable person for whom the fiduciary was acting to make the provisions relied upon by the government applicable."

As the court says in the same opinion, the tax is upon "persons natural and corporate."

The Act of October 3rd, 1917, applies only to taxpayers existing at the time of the passage of the Act or thereafter coming into existence, or representatives, specified in the Act itself, of taxpayers who had become non-existent when the Act was passed.

If the tax is upon the corporation and not *in rem*, upon the income as property, then before the taxing officers of the Government can demand the payment of a tax from an individual taxpayer, they must point out the provision in the statute which justifies the demand. At the time of the passage of the Act, this corporation was not in existence. We have seen that under the Nebraska statute, having met all existing obligations and distributed all its property, it was as completely out of existence as if it had never been organized. Congress could tax it by a tax levied *in personam*, and not *in rem*, only by bringing back into existence the creation of the

statute of Nebraska, which by operation of the laws of that state had ceased to have any existence for any purpose whatsoever. This Congress has no power to do. Congress can doubtless create Federal corporations for Federal purposes, but it cannot create state corporations for the sole purpose of taxing them.

The stockholders of the dissolved corporation were in existence, and were the owners of the income or of the property into which the income had been converted, upon which it is sought to levy this tax. The stockholders could have been taxed, and could have been taxed with respect to the income which had wholly accrued and been distributed among them prior to the passage of the Act.

But Congress has failed in the Act of October 3, 1917, to provide that the stockholders of a dissolved corporation shall be charged personally with income received by them from the dissolved corporation upon the same basis as the corporation would have been taxed if it were in existence at the time the law was enacted. Parenthetically, it may be said that each stockholder incurred liability for taxation under this and previous laws, by receiving from the corporation the income in the form of dividends, but that liability was fully met by the stockholders in their individual returns and is not now in issue.

The real question, therefore, is not whether this law is retroactive with respect to income which accrued prior to its passage, and if it is, whether such retroactive effect invalidates its provisions in that respect; but is rather whether by the terms of the Act itself the tax is levied

upon the only existing representatives of the corporation who received the income.

While by the provisions of the Nebraska statute which have been cited, the directors of a dissolved corporation become trustees and are vested with the title to its property, and are charged with the duty of liquidating its affairs and made liable for its debts to the extent of assets received by them, yet even that trust had wholly ceased in this case, because upon the payment of the debts and the distribution of all the assets, the trust itself, together with the existence of the corporation, would cease to exist. While the statute provides that the trustees shall be subject to control of the court and may be sued in equity on behalf of any person interested, on account of any neglect or omission of duty or abuse of trust, and in case of their removal the court may appoint other trustees to fill the vacancy, yet as these trustees are created by general law, and are not appointed by any court in pending proceedings, they do not remain in office until discharged by a court. The trust ceases when the subject matter of the trust no longer exists.

Can it be said that the failure of the statutory trustees of these corporations to foresee in August the passage of the tax law in October, and retain sufficient property of the companies to pay the tax, was a breach of trust?

Nor can it be said that the provisions in the state statute to the effect that a dissolved corporation may be sued at law or in equity by its corporate name on account of any cause of action which accrued, or but for such dissolution would have accrued against the corpora-

tion if it had not been dissolved, will have the effect of making these corporations in existence *pro tanto*, for the purpose of being subject to the tax established by Congress under the Act of October 3, 1917, after the dissolution of the corporation and the termination of the trust accruing out of it. It was obviously the intention of the state statute, in line with similar statutes in other states, to abrogate the narrow rule of the common law, by which upon the dissolution of a corporation, all its debts were cancelled and all its obligations ceased to exist. *Mumma v. Potomac*, 8th Pet. 281; *McRae v. Kansas City Piano Co.*, 69 Kans. 457; *Clark v. American Can. Coal Co.*, 165 Ind. 213.

But although the state statute was intended to modify the law of corporations in a manner consistent with the financial and commercial purposes for which they are now used, it could not be contended that the legislature of Nebraska had any intent to keep alive the existence of these dissolved corporations, for the purpose of making effective any statute which the Congress of the United States might thereafter enact for levying taxes upon existing corporations.

It was not the intention of the state statute to keep alive these corporations, for the sole purpose of Federal taxation, after they had ceased to exist for any other purpose.

The foregoing suggestions would apply to a case in which at the time of the dissolution the corporation still retained some of its property, and had obligations of some character which required auditing, adjusting and

settling. But in the case of these corporations we are considering, all such arrangements were made before the dissolution. It is competent for a Nebraska corporation under Nebraska statutes to distribute all its property among its stockholders, after having met all its obligations, and then when it remains only a dry shell, to complete the process of dissolution by filing a certificate in the office of the Secretary of State, with the authority of two-thirds of its stockholders. When this step is taken, it cannot be said that the directors or other officers of the corporation ever became trustees or that any trust exists for any purpose. The statute regarding the trust imposed upon the officers was designed to take care of a situation in which property remains in the corporation at the time of its dissolution and obligations may exist with reference to it. But it is clear that if there is no property and no existing obligations there is no trust.

It is apparent, therefore, that before this tax can be incurred, it is necessary to find in this Act a provision that it applies to corporations which had ceased to exist at the time it was enacted, or that the tax which would have been assessed against corporations if they had existed, is by the law levied upon the stockholders who were in existence when the law was passed, and who had received the distributed assets of the corporation.

No tax can be levied by the Treasury Department under the general provisions of the Act, unless there is found specific language applicable to the alleged taxpayer.

In *Smietanka v. First Trust & Savings Bank,* 257 U. S. 602, the language of this court, and its rulings and decision, would seem to overturn the effect

of the cases in the lower courts heretofore relied on by the Government.

In that case, the Government sought to collect an income tax from a trustee in a trust created by a will, which provided that the income of the estate should be accumulated by the trustee and thereafter distributed among the beneficiaries who, at the time of the creation of the trust, might be unborn or unascertained.

In the opinion of the Chief Justice, it is said:

> "There was nowhere in the Act a payment required of the fiduciary of a tax upon the income of the estate or trust property, the income from which he collects, except as it is to inure to the benefit of a person or an individual from whose income he is authorized and required to deduct the normal tax thereon. There must have been a taxable person for whom the fiduciary was acting to make the provisions relied upon by the Government applicable."

After pointing out that the Treasury Department did not attempt for two years to collect the tax in question and thereafter by a change in its rulings had sought to do so and adopted a regulation which would compel the payment of the tax, the court says:

> "This seems to us to graft something on the statute that is not there. It is an amendment, and not a construction."

In the case of *Gould v. Gould*, 245 U. S. 151, this court held that alimony paid to a divorced wife, under a decree of court, is not subject to income tax, under the Act of October 3, 1913, notwithstanding the broad

language of that Act, for the reason that there was no express provision that alimony should be deemed income.

In so holding, the court said:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used; or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

In the case of *Scott v. Railroad Company,* 246 Fed. 545, the Court of Appeals of the Ninth Circuit held that under the Act of October 3, 1913, no income tax was payable by a corporation in the hands of a receiver, for the reason that such cases were not covered by that Act, although it contained the same general language levying a tax upon all income and although there was a receiver in existence capable of representing the corporation, and the court held that the provision in the Act of 1913, requiring receivers to make returns and pay tax, was applicable only to receivers for persons, since there was a failure to mention receivers for corporations in the section of the statute relied upon by the Government.

Where a revenue statute is of doubtful construction, the doubt must be resolved in favor of the taxpayer and a liberal construction must be given words of exception confining the operation of duty; and before the property of the citizen can be taken for revenue, the statute must be clear and unambiguous.

Schwab v. Doyle, Collector, 258 U. S. 529, is one of the latest utterances of this court on this point. There the holding of the court was that transfers or trusts made or created prior to the Act of September 8, 1916, are not comprehended by the provisions of that Act imposing a tax upon the transfer of the net estate of every decedent dying after the passage of that Act, to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust in contemplation of, or intended to take effect in possession or enjoyment, at or after his death, except in case of a *bona fide* sale, and creating a presumption that transfers without consideration within two years prior to death are to be deemed made in contemplation of death. After holding with reference to retrospective laws, that the same principle which absolutely prohibits them when their purpose is punitive, exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated, Mr. Justice McKenna, speaking for the court, said:

> "The Act of September 8, 1916, is within the condemnation.
>
> "There is certainly in it no declaration of retroactivity, 'clear, strong, and imperative,' which is the condition expressed in *United States v. Heth,* 3 Cranch, 398, 413, 2 L. ed. 479, 483, also *United States v. Burr,* 159 U. S. 78, 82, 83, 40 L. ed. 82-84, 15 Sup. Ct. Rep. 1002.

"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected.

"The circumstances of this case impel to such selection. If retroactivity be accepted, what shall mark its limit? The Circuit Court of Appeals found the interrogation not troublesome. It said: 'Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say twenty-five years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years' prima facie provision.' In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelped by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax; that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition to the tax.

"The construction of the Government is more tenable though more unrestrained. It accepted in bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends the statute to 'transfers of any kind made in contemplation of death *at any time whatsoever* (italics ours) prior to September 8, 1916.' The sole test in the opinion of that officer is 'the date of the death of the decedent.' He prefixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administra-

tive officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the Act to relieve from its exactions to satisfy the demands of revenue.

"If Congress, however, had the purpose assigned by the Commissioner, it should have declared it; when it had that purpose it did declare it. In the Revenue Act of 1918 (February 24, 1919, 40 Stat. at L. 1097, chap. 18, Comp. Stat. Sec. 6336 3-4c) it re-enacted Sec. 202 of the Act of September 8, 1916, and provided that the transfer or trust should be taxed whether 'made or created before or after the passage' of the Act. And we cannot accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it."

In the even more recent case of *U. S. v. Merriam*, 263 U. S. 179, this court took the same view. Holding that a bequest in a will, in lieu of compensation as executor thereof, did not render the bequest subject to income tax under the Act of 1917, the court said:

"On behalf of the Government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the

words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould v. Gould,* 245 U. S. 151, 153, 62 L. ed. 211, 213 38 Sup. Ct. Rep. 53."

So also in *U. S. v. Whitridge,* 231 U. S. 144, 58 L. Ed. 159, it was held that the income derived from the management of street railway lines by receivers authorized and required by the order for their appointment to manage and operate such railways is not subject to the excise tax imposed by the Act of August 5, 1909, upon the doing or carrying on of business in a corporate capacity. In announcing the court's decision, Mr. Justice Pitney said:

"A reference to the language of the Act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income.

"And we are unable to perceive that such receivers are within the spirit and purpose of the Act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court; not as officers of the respective corporations, nor with the advantages that inhere in corporate organizations as such. The

possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges."

One of the conspicuous decisions of this court is *Eidman v. Martinez,* 184 U. S. 578. The decision was that American securities passing partly under a will executed abroad by a non-resident alien, and partly under the intestate laws of Spain, are not subject to the inheritance tax imposed by the War Revenue Act of June 13, 1898, Sec. 29, upon personal property passing "either by will or by the intestate laws of any state or territory," since the words "passing by will" are limited by the subsequent words "or by the intestate laws of any state or territory." In reaching this conclusion the court stated the whole rule on the subject, both as to exceptions limiting the taxing power, and as to exemptions open to the taxpayer, as follows;

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of *exception* confining the operation of duty (*Warrington v. Furbor,* 8 East, 242, 247; *Williams v. Sanger,* 10 East, 66, 69; *Denn ex dem. Manifold v. Diamond,* 4 Barn. & C. 243, 245; *Tomkins v. Ashby,* 6 Barn. & C. 541; *Doe ex dem. Scruton v. Smith,* 8 Bing. 146, 152; *Wroughton v. Turtle,* 11 Mees. & W. 561, 567; *Gurr v. Scudds,* 11 Exch. 190), though the rule regarding *exemptions* from general laws im-

posing taxes may be different. *Cooley, Taxn.* 146; *Re Enston,* 113 N. Y. 174, 177; *sub. nom. People v. Sherwood,* 3 L. R. A. 464, 21 N. E. 87."

In the controversy recently pending in this court regarding the validity of the tax on gifts imposed by the act of June 2, 1924, this court, in *Blodgett v. Holden,* 275 U. S. 142, held that it would not so construe the statute, in the absence of clear language requiring such construction, so as to apply to a gift made prior to the passage of the Act, and prior to its introduction and consideration in Congress.

In *Untermyer v. Anderson,* 276 U. S. 440, the court held that although the bill was pending and under consideration in Congress at the time the gifts in this case were made, yet it was not applicable, because its provisions, as applied to such gifts, were arbitrary and invalid under the due process clause of the Fifth Amendment; and in *Bromley v. McCaughn,* 280 U. S. 124, the court held the Act valid as to gifts made subsequent to its passage. All of these decisions were by a divided court.

CONCLUSION

For the reasons, therefore:

1. That this corporation never was subject to the tax now sought to be recovered;

2. Even if the corporation was subject to the tax, the stockholders who received their distribution before the passage of the law, are not liable for it, the Government being in the position of a subsequent creditor as to them;

3. Even if the corporation were originally liable, yet it made its return, as provided by statute, and is entitled to the protection of the limitations contained in the Acts of 1921, 1924 and 1926;

4. Even if no return was made, yet the corporation is entitled to the protection of Section 278 (d) of the Act of 1926, because the suit was brought more than six years after the assessment;

5. And, finally, there is no "trust fund" theory which will aid the Government in overcoming these objections to the suit;

It is respectfully submitted that the decisions of the district court and circuit court of appeals should be affirmed.

FRANCIS A. BROGAN,

ALFRED G. ELLICK,

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DANA B. VAN DUSEN,

Attorneys for Respondents.

APPENDIX

Section 13 (b) Revenue Act of 1916 (39 Stat. 771):

"(b). Every corporation, joint-stock company or association, or insurance company, subject to the tax herein imposed, shall, on or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, or, if it has designated a fiscal year for the computation of its tax, then within sixty days after the close of such fiscal year ending prior to December thirty-first, nineteen hundred and sixteen, and the close of each such fiscal year thereafter, render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which the return is prepared, or in the case of a foreign corporation, company, or association, to the collector of the district in which is located its principal place of business in the United States, or if it have no principal place of business, office, or agency in the United States, then to the collector of internal revenue at Baltimore, Maryland. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue."

Revenue Act of Oct. 3rd, 1917 (40 Stat. 338):

TITLE XIII—GENERAL PROVISIONS.

Sec. 1302. That unless otherwise herein specially provided, this Act shall take effect on the day following its passage.

Section 200, page 302. The term 'taxable year' means the twelve months ending December thirty-first, excepting in the case of a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year. The first taxable year shall be the year ending December thirty-first, nineteen hundred and seventeen, except that in the case of a corporation or partnership which has fixed its own fiscal year, it shall be the fiscal year ending during the calendar year nineteen hundred and seventeen.

Page 307, Sec. 212. That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed, and not inconsistent with the provisions of this title, are hereby extended and made applicable to all the provisions of this title and to the tax herein imposed, and all provisions of Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, relating to returns and payment of the tax therein imposed, including penalties, are hereby made applicable to the tax imposed by this title.

Reg. 33, Art. 61. A corporation which was dissolved in 1917, prior to passage of war revenue Act of October 3, 1917, is subject to tax under the Act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the Act of October 3, 1917. (*Brady, et al v. Anderson*, 240 Fed. 665) Corporations so situated will make a return on revised Form 1031, covering the

period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have paid any excess profits tax under the Act of March 5, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the Act of October 3, 1917.

Compiled Statutes of Nebraska, 1922.

Section 453. Dissolved corporation may be sued. Any such dissolved corporation may be sued at law or in equity, in and by its corporate name, for or upon any cause of action accrued, or which but for such dissolution would have accrued against such corporation, in the same manner and with the like effect as if such corporation were not dissolved, and all process by which any suit, either at law or in equity, may be instituted against any such dissolved corporation, may be served by the sheriff or any other proper officer by delivering to any one of the assignees, trustees, receivers or persons having charge of the assets of such dissolved corporation a copy thereof, or by leaving such copy at the residence of any such assignee, trustee, receiver or person having charge of such assets.

Section 468. Dissolution. No corporation can be dissolved by the members thereof, except by consent of two-thirds of all its members, which consent must be entered on its records, unless a different rule has been adopted in its articles of incorporation.

Section 700. Report of dissolution-occupation tax. Each domestic corporation in case of dissolution or revocation of its charter shall file with the secretary of state a certificate of such dissolution or revocation of its charter; in case of dissolution by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation. * * *.

Section 447. Upon its dissolution, by the expiration of the terms of its charter, or otherwise, of any corporation now existing, or hereafter created, and unless other persons be appointed by the legislature or by some court of competent authority, the directors or managers of the affairs of such corporation, acting last before the time of its dissolution, by whatever name they may be known in law, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts and divide among the stockholders the money and property that shall remain, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses * * *.

Regulation 33, Article 196, effective January 6th, 1914 to December 31st, 1921, was as follows:

"Where the required returns are not filed within the prescribed time, either by individuals or corporations, notice on Form 1045 should in each case be sent to the delinquent."

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CHARLES ELMORE C
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In the Supreme Court of the United States

No. 340

OCTOBER TERM, 1929

UNITED STATES OF AMERICA,
Petitioner,

vs.

NELSON B. UPDIKE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR GEORGE A. ROBERTS, RESPONDENT

WARREN H. HOWARD,
FRANCIS A. BROGAN,
ALFRED G. ELLICK,
Attorneys for Respondent.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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In the
Supreme Court of the United States

No. 340

OCTOBER TERM, 1929

UNITED STATES OF AMERICA,
Petitioner,

vs.

NELSON B. UPDIKE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR GEORGE A. ROBERTS, RESPONDENT

NATURE OF THE SUIT

This is a proceeding begun April 2, 1927, to collect a tax from the former stockholders of the Updike Grain Company, dissolved in August, 1917, as transferees of the assets of that company, which tax was assessed against that company in January, 1920, under the Revenue Act of October 3rd, 1917, upon the income of that company, for the fiscal period January 1, 1917, to June 30, 1917.

QUESTIONS PRESENTED

I.

The collection of the sum sought to be recovered herein from the defendants, as transferees of the assets of the Updike Grain Company, is barred by Section 278 (d) of the Revenue Act of 1926. (44 Stat. 59).

II.

The collection of the sum sought to be recovered herein from the defendants, as transferees of the assets of the Updike Grain Company, is barred by Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) and Section 277 of the Revenue Act of 1924. (43 Stat. 299).

III.

If the collection of these taxes from the Updike Grain Company, at the time these proceedings were begun, is barred by the limitations contained in any of the revenue acts, this suit cannot be maintained against the transferees as an independent suit for the recovery of trust funds.

IV.

The assets of the Updike Grain Company were transferred to the respondents herein in August, 1917, the liability for the tax did not arise in any event until the passage of the Revenue Act of 1917, on October 3rd, 1917, (40 Stat. 300-338), and this suit against such transferees cannot be maintained, because the Government thereby, if

at all, became a creditor for such tax subsequent to the time the transferees received the assets, there being at the time of transfer no tax liability nor an existing statute under which a tax liability could arise.

V.

The provisions of the Revenue Act of October 3, 1917, are not applicable to a corporation which was lawfully dissolved under state law, after having discharged all its existing obligations and distributed all its assets among its stockholders, prior to the enactment of said act.

STATEMENT OF FACTS

While the statement contained in the Government's brief is only inaccurate, in that it is stated on page 4 that no returns were ever filed in behalf of the corporation under the Revenue Act of 1917, and on page 5 that the present suit was begun under the "trust fund" doctrine to recover "funds" received by the stockholders to the use of the United States, yet it omits portions of the record necessary to a full understanding of the issues presented by the respondents herein.

The Updike Grain Company was a corporation organized under the laws of the State of Nebraska, and was dissolved pursuant to those laws during the month of August, 1917. Prior to its dissolution it had paid all its debts and obligations of every character, including all taxes which had accrued, or could accrue, to the Government of the United States under the then existing revenue laws (R. 91, 127).

Under the revenue laws, the Updike Grain Company had selected a fiscal year as the basis of its federal taxation, which terminated on June 30, 1917 (R. 161). Within sixty days thereafter it filed an income tax return on Form 1031 (Revised October 1916) and a profits tax return on Form 1095, pursuant to the provisions of Sec. 13 (b) of the Revenue Act of 1916, (39 Stat. 771) fully set forth in the appendix to this brief. The income shown in those returns is the sole basis of the claim of the Government for the taxes accruing under the Act of October 3, 1917. Although the corporation remained in existence after June 30, 1917, until its dissolution in Au-

gust of that year, yet it is not claimed by the Government that it transacted any business, nor is any claim made for taxes accruing after that period. Not only did the taxpayer report fully and honestly to the Government, all income received by it, and every fact, regarding the income, called for by existing laws and treasury regulations, (R. 107) but, by an unintentional error in calculation, it reported a greater income than it was actually taxable for, and the effect of the Government's audit was to reduce the taxable income of the taxpayer for that period (R. 113, 145).

It is true that Form 1031 (revised January, 1918) was mailed to the taxpayer, in the usual course of mailing blank returns to all taxpayers and was received by its former secretary, in March, 1918, seven months after its dissolution, but he immediately returned it with a letter stating that the corporation was dissolved, that it had filed its returns showing all the income which it had received up to the time of its dissolution, had paid all taxes accruing to the United States Government under existing laws and regulations, and also called attention to the fact that subsequent to its dissolution it had made final returns, showing all its income (R. 91). Thereafter no action was taken by the Bureau of Internal Revenue under Regulation 33, Article 196, in effect from January 6, 1914, to December 31, 1921, (see appendix), by sending to the taxpayer a notice on Form 1045, or by making other demand for returns (R. 349).

During the month of October, 1918, an agent of the Internal Revenue Bureau examined the books and records of the Updike Grain Company for the fiscal years end-

ing in 1913, 1914, 1915, 1916, and 1917, to determine its tax liability for said years, and the fiscal period in 1917 ending June 30, 1917 (R. 95). When he called at the former office of the company and conferred with its former secretary he asked for copies of the returns which the company had made for the fiscal year ending June 30, 1917, and these were furnished and used by him in making his audit (R. 350). The agent made up returns upon the forms then in effect, a corporation income tax return on Form 1031, revised January, 1918, and a corporation excess profits tax return on Form 1103 (R. 131-35). These returns were not signed, but it is significant that the agent of the Bureau, in preparing and transmitting them, (to the commissioner), denominated them "amended returns." In his report to the Department (R. 107) the agent sent in the draft of amended returns, unsigned. When this report was transmitted by the Omaha office to the Commissioner's office in Washington, it was accompanied by a letter (R. 105) in which the agent's action is referred to as a report "of the returns of annual net income of the Updike Grain Company." In subsequent correspondence between the Omaha office and the Washington office on the subject (R. 101) this report of the Revenue Agent is referred to as "supplemental return, fiscal year ended June 30, 1917." In a letter from the Revenue Agent in Charge at Omaha to the Updike Grain Company (R. 317) and another letter of November 24th, 1919 (R. 323), and in various copies, reports, official actions and records, the returns made by the Updike Grain Company, within sixty days from the close of its fiscal year ending June 30, 1917, were referred to as the returns of the corporation for the taxable period then

under consideration, and in all the transactions of the Government officials concerning them they are treated and referred to as amendments, supplements or revisions of those returns and were recognized, accepted and adopted as returns under the Revenue Act of October 3, 1917. In January, 1920, the Commissioner of Internal Revenue assessed a tax against the Updike Grain Company for the amount now sought to be collected in this suit, and, among other entries in the Government records, stamped upon the income tax return of the company made by it in July, 1917, for the fiscal period in question, the assessment in the amount sought to be recovered herein (R. 165).

The defenses presented in the lower court were that no tax ever accrued against the Updike Grain Company, that the stockholders were not liable for the subsequent obligations of the company, if any existed, and that the suit was barred by the limitation provisions of the revenue laws of 1921, 1924 and 1926.

———o———

ARGUMENT

I.

The Collection of the Sum Sought to be Recovered Herein from the Defendants as Transferees of the Assets of the Updike Grain Company is Barred by Section 278 (d) of the Revenue Act of 1926.

The full text of Section 278 (d) of the Revenue Act of 1926 appears in the appendix, but the applicable part to this case is, as follows:

> "Where the assessment of income, excess profits, or war profits tax imposed * * * by prior act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax."

The following concessions are made by the Government in its brief or are undisputed in the record:

(a) That the amount sought to be recovered herein represents income, excess profits and war profits taxes imposed by a prior Act of Congress, to-wit: The Revenue Act of 1917. (Gov. Brief, 4).

(b) That the taxes were assessed against the taxpayer before the enactment of the Revenue Act of 1926. (Gov. Brief, 4).

(c) That the taxes were assessed in January, 1920. (Gov. Brief, 4).

(d) That this suit was begun April 2, 1927, more than six years after the assessment of the taxes was made. (Gov. Brief, 5).

(e) That no other suit or proceedings has been begun against the taxpayer, the stockholders, these respondents, or any one else, for collection of the taxes. (Gov. Brief, 5).

(f) There were no waivers or consents by the taxpayer or any one else, extending the time for assessment or collection of the taxes.

The Government in its brief contends that Section 278 (d) does not bar this suit, (1) because this is not a proceeding to collect taxes, (2) because the taxpayer filed no return, in which case the tax could have been assessed "at any time," which is not a "statutory period of limitation properly applicable thereto."

We will discuss these contentions in the order enumerated, keeping in mind the rule of construction announced by this court in *Bowers v. New York & Albany Lighterage Co.*, 273 U. S. 346, that limitation provisions in a Revenue Act take on the same rule of construction applicable to other provisions of Revenue laws, to-wit: that same "are to be interpreted liberally in favor of the taxpayer," and doubts are to be resolved against the Government.

1.

Is this a proceeding to collect a tax?

It has been the uniform and continuous understanding of Congress, the General Counsel of the Bureau of

Internal Revenue, this court and other Federal courts, the Department of Justice, the attorneys for the Bureau of Internal Revenue, the Commissioner of Internal Revenue and the Board of Tax Appeals, in decisions expressly acquiesced in by the Commissioner of Internal Revenue, that proceedings against transferees of the assets of a taxpayer to collect a tax assessed against the taxpayer are "proceedings to collect a tax", and the proceedings in this case were so understood and declared to be such in the pleadings filed herein, with the approval of the Commissioner of Internal Revenue, the Department of Justice and the attorneys for the Bureau of Internal Revenue.

GOVERNMENT PLEADINGS

In the letter of C. R. Nash, acting Commissioner of Internal Revenue, to the United States District Attorney at Omaha, dated March 21st, 1927, authorizing the institution of this suit (R. 149), it is stated:

> "Reference is made * * * to the matter of beginning a suit in equity against the former stockholders of the Updike Grain Company, a dissolved corporation, to collect additional income and excess profits taxes assessed against said corporation in the amount of $373,911.54, for the eleven months' period ended June 30, 1917."

In a telegram from Blair, Commissioner, to the United States District Attorney, dated April 2, 1927, the date the suit was instituted (R. 153) the Commissioner expressly approved the bill of complaint as filed and authorized its filing.

The bill of complaint, as filed and subsequently amended, except as otherwise indicated, was against sixty-seven stockholders as defendants (R. 1), thirty-nine of whom were residents of Nebraska (R. 2, 3) and thirty-two of whom were served with writs of subpoena, and are respondents in this proceeding. (R. 81, 397). The allegations were, as follows:

> Paragraph XIX (R. 5): "This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for internal revenue and the collection thereof."

On the last day of the trial of the case (R. 64), this paragraph was amended to read, as follows:

> "This is a suit in equity brought by the United States of a civil nature." (R. 12).
>
> Paragraph XXIII (R. 8): "Complainant says that there is due and owing to it, the said complainant, from said Updike Grain Company, on account of the matters and things hereinbefore set forth the sum of $373,911.54, together with interest thereon, as provided by law, from the time said amount became due."
>
> Paragraph XXVI (R. 10): "By reason of the said dissolution and distribution of all the assets, said corporation was left without money, assets or property of any kind with which to pay the said taxes due and owing to the United States, and the defendants received the entire money, assets and property charged with a trust in favor of the United States to the extent of the said taxes due and unpaid by it as hereinbefore set forth."
>
> Paragraph XXVII (R. 10): "That the complainant has no plain, adequate or complete remedy at law against said Updike Grain Company or the defendants."

> Paragraph XXVIII (R. 10): "That the Commissioner of Internal Revenue authorizes and sanctions these proceedings."

This paragraph was also amended at the trial by interlineation by adding after the words "Internal Revenue," the words "and the Attorney General of the United States." (R. 160).

Paragraph XXIX (R. 11) is the prayer, wherein the complainant prayed:

> "That this Court decree that the corporate assets of said Updike Grain Company so distributed to the defendants constitute a trust fund for the payment of said taxes due and owing by the said corporation to the United States, and that the said defendants shall account to this court for the aforesaid trust property, and that the fund aforesaid be applied to the payment of said taxes due and owing to the complainant."

In the opinion of the trial court by Honorable T. C. Munger, D. J., filed April 13th, 1928, it is stated:

> "The purpose of the suit is to recover the amount of the tax assessed against the defendant [Updike Grain Company] from the transferees of the corporate assets." (R. 65).
>
> "But in this case an assessment was made. It was made by the Commissioner of Internal Revenue. It is the foundation of this suit." (R. 67).
>
> "The United States delayed proceedings for the collection of the tax it claims to be due from defendants." (R. 69).

In the opinion of the Circuit Court of Appeals, filed March 21st, 1929, it is said:

> "While this is a case against transferees, we must consider that it is a proceeding in court to collect a tax, notwithstanding that it is an action against transferees." (R. 394).

CONGRESS

Congress has at all times understood and recognized proceedings of this character to be proceedings for the collection of taxes, in the following particulars:

(a). Congress first took cognizance of proceedings against transferees to collect taxes in the Revenue Act of 1926, by the enactment of Section 280 of that Act (44 Stat. 61), wherein it provided for summary proceedings against transferees of property of a taxpayer for the collection of the tax imposed upon the taxpayer, identical with the summary proceedings therein provided against the taxpayer, to-wit: By notice of intention to assess the liability for the tax against the transferee, with an opportunity to appeal to the Board of Tax Appeals within sixty days from the date of the notice, failing in which to be thereafter deprived of the right to question the assessment in court or otherwise. The only justification for such a summary procedure would be that it was for the collection of a tax, otherwise such a procedure would not constitute due process of law.

The provisions of Section 280, indicating that proceedings against transferees were proceedings to collect a tax, and are subject to all of the limitations against the taxpayer, are as follows:

Sec. 280 (a) "The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

(b). In the Conference Report to the House of Representatives on the Revenue Bill of 1926, dated February 22d, 1926, at pages 43 and 44, the purport of Section 280 was stated to be, as follows:

"Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts. Such a proceeding is in lieu of the present equity proceeding and is exclusive, save that, of course, in a proper case, a tax lien upon the assets arising prior to their transfer may be enforced against the transferee by distraint, or in case of real estate by a proceeding in equity. In the case where the taxpayer remains in existence after the transfer, an unsatisfied return of a distraint warrant, issued in pursuance of an assessment lawfully

made after a deficiency letter has been mailed to the taxpayer, would suffice in lieu of an unsatisfied execution to establish the liability of the taxpayer.

"In view of the above situation it will be seen that the amendment makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes. The amendment thereby substitutes the specialized and more expeditious procedure of the board for that of the district courts in equity and will develop through the board a uniformity of precedents in lieu of the present rather vague principles of law governing the liability of a transferee for unpaid taxes of a transferor. * * *

"Under the amendment the liability of the taxpayer for the tax, including all interest and penalties, is fixed as of the time of the transfer of the assets.

* * * * *

"The statute of limitations as to collection is covered by the incorporation by reference of section 278 (d)."

(c) In the report, dated November 15, 1927, of The Joint Committee on Internal Revenue Taxation, established under Section 1203 of the Revenue Act of 1926 (44 Stat. 127), made after it had been uniformly held and ruled by all departments of the Government, that the limitation provisions affecting the collection of taxes against taxpayers, applied to transferees, it was stated on page 67, in referring to the effect of Section 280, as follows:

"In substance it subjects him to the same proceeding, as though he were the taxpayer."

and on page 68:

"At present no change is recommended as to limitation proceedings."

(d) Congress sought in Section 280 to make the summary proceedings provided in Section 280 the exclusive procedure against transferees. That is not only indicated by the language of Section 280, which required that the liability of transferees should be assessed and collected in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed upon the taxpayer, which was exclusively by the provisions of Section 274 of the Revenue Act of 1926 (44 Stat. 55), but also in the Report of the Committee on Ways and Means to the House, dated December 7, 1925, Page 10, the Report of the Committee on Finance of the Senate, dated January 16, 1926, Pages 28, 29 and 30, the Statement of the Managers on the Part of the House, contained in the Conference Report to the House on the Revenue Act of 1926, dated February 22d, 1926, Pages 39, 43 and 44, and the Report of The Joint Committee on Internal Revenue Taxes, dated November 15th, 1927, Page 15.

No such attempt could be justified unless Congress was acting upon the theory that proceedings against transferees, for the collection of taxes imposed upon a transferor taxpayer, are "proceedings to collect a tax."

The Government in its brief contends that the provisions of Section 280 indicate that Congress did not intend that proceedings against a transferee to collect a tax should be subject to the limitation provisions contained in the Revenue Laws, and bases this contention upon the assertion that by enacting "specific statutes of limitations" in Section 280, Congress indicated an intention to restrict the application of Section 278 (d) in the

same Revenue Act (44 Stat. 59) to proceedings against the taxpayer only.

The Government admits that the terms of Section 278 (d) are broad enough to bar this suit, but seeks to limit its application to proceedings against a taxpayer, only, solely by claiming that Section 280 indicates a contrary intention by Congress, notwithstanding the well settled rule of statutory construction, that in construing plain and unambiguous statutes the intention of congress is not a subject of inquiry.

When we analyze Section 280, however, we find that that section indicates an intention of Congress, entirely consistent with the Reports of its Committees, set forth above, and the contention of respondent.

Bearing in mind that this is a proceeding to "collect" and not to "assess," and that Section 278 (d) deals solely with the right to "collect," it is, therefore, necessary for us to ascertain (1) if Congress did in fact restrict the effect of Section 278 (d) by any "specific statutes of limitation" in Section 280 on the collection of taxes from transferees, and (2) the real intention of Congress in that respect, if possible.

Section 280 deals with limitations upon both the right to *"collect"* a tax from, and the right to *"assess"* a tax against, a transferee, but it deals with the right to *"collect,"* only in the general terms of Paragraph (a) thereof, wherein the general limitation statutes of the Revenue Acts are expressly made applicable to proceed-

ings thereunder against transferees, by the use of the following language:

> "The amounts * * * shall except as hereinafter in this Section provided, be assessed, *collected,* and paid in the same manner and subject to the same provisions and *limitations* as in the case of a deficiency in a tax imposed by this title (* * * including * * the provisions authorizing distraint and proceedings in court *for collection*). (Our italics).

Note the phrase "except as hereinafter in this Section provided." Thereinafter there was no provision otherwise limiting the time *"for collection,"* but there were specific provisions changing the time for *"assessment,"* which simply extended "the period of limitation for *assessment* of any such liability" to "within one year after the expiration of the period for *assessment* against the taxpayer," or if an assessment had been made against the taxpayer before the time for assessing him had expired, to any time within six years after the assessment, but in no case later than one year after the enactment of the 1926 Act, to-wit: February 26, 1926 (Sec. 280 (b) (1) (2), Rev. Act of 1926. (See Appendix).

It must be quite clear from an analysis of Section 280 that Congress expressly made proceedings thereunder, both to assess and collect, subject to limitation statutes contained in other sections of the Act and particularly in Section 278 (d), with the one year extension for assessing, only.

GENERAL COUNSEL BUREAU OF INTERNAL REVENUE

The General Counsel of the Bureau of Internal Revenue in memoranda opinions promulgated for the guidance

of collectors, Revenue Agents and other employees of the Treasury Department, in administering the Revenue laws, has recognized that proceedings against transferees for the collection of their liability for taxes of their transferors, are proceedings to collect a tax and are subject to the provisions of the Revenue Laws.

In G. C. M. 1029, Cum. Bull. VI-1, p. 115, promulgated on January 10, 1927, it was held that Section 280 of the Revenue Act of 1926 had no retroactive application and therefore, if the tax liability of the transferor taxpayer was barred prior to the enactment of the Revenue Act of 1926, the liability of a transferee therefor could not be asserted under Section 280, notwithstanding the one year period after the expiration of the period of limitation for assessment against the taxpayer, as provided in Section 280 (b) (1), had not yet expired; and in that connection the liability of transferees was referred to, as follows:

> "Under that section the transferees' liability is no greater nor more comprehensive than that of the transferor taxpayer. The section merely prescribes a method for the enforcement of an established liability and adopts, for this purpose, the method of assessment applicable to the collection of taxes in the ordinary case. The logical conclusion is that it was not the purpose of Congress to make effective against a transferee a tax liability which at the time of the enactment of the Revenue Act of 1926 could not be asserted against the transferor taxpayer because of the bar of the Statute of Limitations."

In G. C. M. 2408, Cum. Bull. VI-2, p. 95, it was held that a consent in writing signed by a taxpayer, pursuant

to the provisions of Section 278 (c) of the Revenue Act of 1926, (44 Stat. 59), which reads, as follows:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon."

extended the time for proceeding against the transferee of the assets of the taxpayer, although Section 278 (c) related only to "the taxpayer."

In G. C. M. 4554, Cum. Bull. VII-2, p. 86, the General Counsel accorded to a transferee the refund rights granted in Section 607 of the Revenue Act of 1928, (45 Stat. 874), where a tax had been paid by a transferee after the expiration of the period of limitation for assessment and collection of the tax against the taxpayer, notwithstanding such rights were granted in that section only to the *"taxpayer"* and related only to *"any tax."*

COURTS

No court has yet held in a suit of this nature that any liability of a transferee existed after the tax liability of the transferor had become barred. On the contrary, the following courts, in addition to the lower courts in this case, have held that when the tax liability of the transferor became barred, the right to proceed against the transferee of the assets of such transferor was likewise barred:

Russell vs. United States, 278 U. S. 181.

United States vs. Lazenby, 5 Fed. (2d) 827, (D. C. N. D. Texas).

United States vs. Whyel, 19 Fed. (2d) 260. (D. C. W. D. Pa.), affirmed 28 Fed. (2d) 30 (3rd C. C. A.)

United States vs. Snook, 24 Fed. (2d) 844 (D. C. N. D. Ga.) Reversed on other grounds 28 Fed. (2nd) 30.

United States vs. Armstrong, 26 Fed. (2d) 227. (8th C. C. A.)

Nauts vs. Clymer, 36 Fed. (2d) 207. (6th C. C. A.).

United States vs. Cabots, 5 Fed. Tax Rep. 6172. (U. S. Ct. Cl.)

In *Russell vs. United States,* supra, being a suit in equity against stockholders of a corporation to collect taxes assessed against the corporation, this court held that the right to collect those taxes from such transferees was barred by the limitation provisions in the Revenue Acts of 1918 and 1921. The Government was conceding that the right to collect the taxes from the transferees was barred, unless the time for collecting same had been extended by Section 278 (d) of the Revenue Act of 1924. This court accepted the view that the proceedings against the transferees were barred, unless the period of limitation had been extended by Section 278, as is evidenced by the following statements in the opinion:

> "Manifestly, but for Section 278, petitioners would be free from liability under the five-year limitation in the Act of 1918, continued by the Act of 1921."

In *United States vs. Lazenby,* supra, the court said:

> "That the instant suit is not against the original taxpayer, but is at equity against a person who re-

ceived all of the assets of the taxpayer, must not prevent a reasonable view of the statute of repose which Congress evidently intended. The language of the statute is that 'no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.' Certainly there can be no other object in the present suit. It is for the collection of a tax."

In *United States v. Snook*, supra, it was said about the suit:

> "Its foundation, to be sure, is a tax claim against the corporation, and in my opinion, if this were barred, this suit would fail."

In the following cases, upon the insistence of the attorneys for the Government, the courts held that Section 3224 of the Revised Statutes providing:

> "That no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court"

applied to suits by transferees to enjoin proceedings to collect their liability for taxes:

Felland vs. Wilkinson, 33 Fed. (2d) 961, (D. C. W. D. Wisc.)

Ralston vs. Heiner, 24 Fed. (2d) 416 (3d CCA)

In *Felland vs. Wilkinson*, supra, the court used this significant language:

> "It must be borne in mind that while the liability of a transferee may not be a tax liability in the ordinary sense, nevertheless it is a liability for a tax; in other words, the government is seeking to collect what is primarily a tax and continues to be

a tax authough, because of the inability to collect from the taxpayer proper, it seeks to require his transferee to pay. From the standpoint of the government the money sought in this case is as much an item of revenue as it would be were the proceedings to collect directed toward the Stoughton Lumber Association."

In *United States vs. Kemp,* 12 Fed. (2d) 7, (5th CCA), being a suit in equity upon the "trust fund" theory against transferees, it was held, upon the insistence of the attorneys for the Government, that a waiver signed by the taxpayer extending the period of time for collection of a tax against the taxpayer, operated to extend the period of time for collection of such tax against the transferees of the taxpayer, thus applying the waiver provisions in Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265) to a transferee, and thereby recognizing the suit to be a proceeding for the collection of a tax.

DEPARTMENT OF JUSTICE AND ATTORNEYS FOR THE BUREAU OF INTERNAL REVENUE

The Department of Justice and attorneys for the Bureau of Internal Revenue have persistently and consistently taken the position in the following court cases, that proceedings against transferees were proceedings to collect taxes and that an attempt by such transferees to enjoin such proceedings came within the inhibitions of Section 3224 of the U. S. Rev. St., quoted supra:

Owensboro Ditcher & Grader Co. vs. Lucas, 18 Fed. (2d) 798, (D. C. W. D. Ky.).

Ralston vs. Heiner, 24 Fed. (2d) 416. (3d CCA).

Felland vs. Wilkinson, 33 Fed. (2d) 961, (D. C. W. D. Wisc.).

Trinacia Real Estate Co. vs. Clark, 34 Fed. (2d) 325, (D. C. N. D. N. Y.)

Mid-Continent Petroleum Corp. vs. Alexander, 35 Fed. (2d) 43, (D. C. W. D. Okla.)

Routzahn vs. Tyroler, 36 Fed. (2d) 208 (6th CCA).

In the case of *Routzahn vs. Tyroler,* the transferee was contending that Section 280 of the Revenue Act of 1926 was unconstitutional, because there was no provision in the Revenue Laws permitting the transferee to appeal to the courts from an adverse ruling by the Board of Tax Appeals, but although the right of review of the decision of the Board of Tax Appeals was given only to a "taxpayer" in the Revenue laws, the Department of Justice and the attorneys for the Bureau of Internal Revenue induced the court to hold that a transferee was a "taxpayer" within the meaning of that "term", as used in Section 1001 of the Revenue Act of 1926 (44 Stat. 109) (Certiorari denied, _____).

It is suggested on p. 14 of the Government's brief, that by the enactment of Section 604 of the Revenue Act of 1928, (45 Stat. 803), prohibiting suits to restrain the enforcement of the liabilities of transferees under Section 280, Congress indicated an intention to treat the liability of transferees as distinct from the liability of taxpayers, because the enactment of that section was not necessary, if Section 3224 R. S. was applicable.

It is quite evident that because of the divergent opinions rendered by the inferior courts, in the cases cited above, with respect to the effect of Section 3224, that Con-

gress simply passed Section 604, undoubtedly at the instance of the Bureau of Internal Revenue, in order to settle this controversy by statute, instead of awaiting an opinion of a court of last resort, and that the inference sought to be drawn by the Government is not justifiable under the circumstances.

COMMISSIONER OF INTERNAL REVENUE

In addition to being a party to the court proceedings and the rulings of the General Counsel, referred to above, the Commissioner of Internal Revenue has upon other occasions taken the position that proceedings against transferees were proceedings to collect a tax.

In the case of *Trinacia Real Estate Co. vs. Clark,* supra, it appears that he made a jeopardy assessment against a transferee under Section 279, Revenue Act of 1926 (44 Stat. 59), which contains no reference to transferees, but only grants the right to the Commissioner to make jeopardy assessments against the "taxpayer." It further appears from the facts in the *Trinacia* case that in the very notices sent out by the Commissioner of Internal Revenue, in proceedings against transferees under Sections 280 and 274, the Commissioner recognizes that such proceedings are for the collection of "a tax", because in the notice sent out in that case, which we assume is the standard form, the Commissioner said:

> "In accordance with the provisions of Section 279 (a) of the Revenue Act of 1926, there has been assessed against you income tax, penalty and interest, amounting to $16,502.66, for the taxable years 1920 to 1926, inclusive, as transferee of the assets of Joseph Falcone * * *. As provided in Section 280 of

the Revenue Act of 1926, there has been assessed against you the amount of $16,502.66 in taxes, penalties and interest, constituting your liability as a transferee of the assets of Joseph Falcone * * * for unpaid income taxes, penalties and interest, in the amount of $16,502.66 assessed against Joseph Falcone * * *."

On December 31st, 1926, the office of the Commissioner of Internal Revenue took the position in the instant case, that the right to proceed against the respondents herein was barred by the limitation provisions in the Revenue Laws, because in a letter of that date, from C. R. Nash, Assistant to the Commissioner, to the Collector of Internal Revenue, at Omaha, Nebraska, (R. 291), it is said:

> "Reference is made to the following tax due from the above named company:
>
> "$373,911.54, assessed on the Commissioner's January 1920 List, Page 14, Line 1.
>
> "This office has decided that there is no liability which can be asserted against Mr. Nelson B. Updike, Omaha, Nebraska, et al, as transferees of the property of the taxpayer, pursuant to the provisions of Section 280 of the Revenue Act of 1926. The amount of tax set forth above should, therefore, be abated as uncollectible on Form 53."

BOARD OF TAX APPEALS

The Board of Tax Appeals has uniformly adhered to the rule that the limitation provisions in the Revenue Laws, respecting proceedings for the collection of a tax are applicable to proceedings against transferees:

> *Spencer vs. Commissioner*, 11 B. T. A. 437, decided April 9, 1928, acquiesced in by Commissioner, July 30, 1928, I. R. B. VII-31-3128.

Wheeler vs. Commissioner, 16 B. T. A. 96, decided April 22, 1929, acquiesced in by the Commissioner, I. R. B. VIII-31-4290.

Hynes vs. Commissioner, 16 B. T. A. 1272, decided June 29, 1929, approved and following the opinion of the CCA in the instant case.

Barron-Anderson Co. vs. Commissioner, 17 B. T. A. 686.

Hilder vs. Commissioner, 17 B. T. A. 1189.

Angier Corporation vs. Commissioner, 17 B. T. A. 1376.

Gleichman vs. Commissioner, 17 B. T. A. 147.

Southwestern Investment Co. vs. Commissioner, _____ B. T. A. _____, decided February 26, 1930.

In the Government's brief, p. 19, it is said that Bureau rulings and Board decisions are not in point, because they were made with reference to proceedings against transferees under Section 280, but in that the Government is in error, because in G. C. M. 1029, supra, and in *Spencer vs. Commissioner*, supra, and *Barron-Anderson Co. vs. Commissioner*, supra, it was held that Section 280 being silent as to whether a transferee may be assessed, where the period of limitation for assessment against the taxpayer expired prior to the enactment of the Revenue Act of 1926 without any assessment or proceedings in court against the taxpayer having been made or begun, they would therefore apply the general rule that the right to enforce a liability against a transferee became barred when the right to enforce the tax against the taxpayer became barred.

We have recently noted that under date of February 4, 1930, the acquiescence of the Commissioner in *Spencer vs. Commissioner,* under date of July 30th, 1928, was revoked, no reason given therefor. This long delayed revocation has all the aspects of a mere gesture for the purpose of this litigation, but G. C. M. 1029 still stands as a ruling for guidance of Revenue agents, attorneys, etc.

In the *Wheeler case,* supra, the Board of Tax Appeals held:

> "Where the liability of the taxpayer is extinguished, by Section 1106 (a) of the Revenue Act of 1926, the liability of a transferee, under Section 280 of the same Act, is also extinguished."

The acquiescence in this decision has not yet been revoked.

The *Gleichman* and *Southwestern Investment Co. cases,* supra, followed the rule in the Wheeler case.

In the *Hilder case,* supra, the Government's attorneys conceded that the right to collect the tax against the transferees was barred, because it was barred against the taxpayer at the time of the enactment of the Revenue Act of 1926, and the Board so held.

The foregoing are decisions by the Board of Tax Appeals, to which Congress has endeavored, in the 1926 and 1928 acts, to give exclusive jurisdiction over proceedings against transferees, and although the Board of Tax Appeals had uniformly been holding contrary to the Government's contention in the instant case, prior to the enactment of the Revenue Act of 1928, Congress did not at-

tempt to disturb those holdings, or the rulings of the Commissioner or the General Counsel of the Bureau of Internal Revenue, or of the courts, as above indicated, by any provision in the Revenue Act of 1928, but re-enacted Sec. 280 in substantially the identical language of the 1926 Act (Sec. 311 Rev. Act of 1928).

In view of the foregoing uniform, consistent and continuous rulings of the Executive Department charged with the administration of the Revenue Laws, and the attitude of congress thereto, the following rules of law announced by this court become pertinent:

In *United States vs. Jackson,* (Dec. 5, 1929), the holding of this court is summarized in the syllabus, as follows:

> "Great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.
>
> "The silence of Congress in the face of a long-continued practice of an executive department involving the construction of a Federal statute must be considered as equivalent to consent to continue the practice."

In *Brewster vs. Gage,* (Jan. 6th, 1930, the holding of this court is summarized in the syllabus, as follows:

> "The practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons.

"The substantial re-enactment in later income tax statutes of a provision theretofore construed by a regulation of the Treasury Department is persuasive evidence of legislative approval of the regulation."

In *Lucas vs. American Code Co.*, (Febr. 24, 1930), the holding of this court is likewise summarized in the syllabus, as follows:

"The interpretation of income tax legislation, and the practice adopted by the department charged with its enforcement should not be interfered with, unless clearly unlawful."

See also

United States vs. Minnesota, 270 U. S. 181.

Buttolph vs. Commissioner, 29 Fed. (2d) 695 (7th CCA).

2.

Is Section 278 (d) of the Revenue Act of 1926 inapplicable if it should be determined that the taxpayer filed no return?

The Government contends that:

(a) The taxpayer filed no return.

(b) The tax could have been assessed or collected by suit, under Section 278 (a) of the Revenue Act of 1926, "at any time."

(c) "At any time" is not a "statutory period" within the meaning of that term as used in Section 278 (d).

In other words, it is claimed that Section 278 (d) does not apply to no-return cases.

We will hereinafter show that returns were filed by the taxpayer in this matter, which set forth all the data necessary to make the assessment, and that those returns were accepted and adopted by the Commissioner as the return of the taxpayer under the October 3, 1917, Act, but for the purposes of this argument we will assume that no returns were filed.

Section 278 (a) of the Revenue Act of 1926 is as follows:

> "In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun *without assessment*, at any time." (our italics).

HISTORY OF SECTION 278 (a)

This section deals with fraudulent return and no-return cases. Prior to the Revenue Act of 1916 there were no limitation provisions in the income tax laws. In the Revenue Act of 1916, among other limitation provisions, was a provision (Section 14 (a)) relieving a taxpayer who failed to file a return, or who even filed an erroneous or fraudulent return, from an assessment or collection of a tax against him, if the Government did not discover that fact within three years after the return was due.

In the Revenue Act of 1918 (Section 250 (d)), a five-year limitation applied to both the assessment and collection of taxes against persons who failed to file a return and the limitation period started to run from the date the return was "due."

In the Revenue Act of 1921, (Section 250 (d)) it was provided:

"That in the case of a false or fraudulent return with intent to evade tax or of a failure to file a required return, the amount of tax due may be determined, assessed and collected and a suit or proceeding for the collection of such amount may be begun at any time after it becomes due."

It will be noted that in the 1921 Act the two separate remedies, of assessing at any time, and of a suit or proceeding for collection at any time, are cumulative, and there is no additional restriction upon the conditions for bringing suit or other proceedings for collection.

Section 278 (a) in the 1924 Act is identical with Section 278 (a) in the 1926 Act and in that Section in the 1924 and 1926 Acts, a marked change was made in the language used in the 1921 Act, by the insertion of the phrase "without assessment" to qualify the clause respecting a proceeding in court to collect. As a result assessments could be made at any time, but a proceeding in court for the collection of the tax could only be begun "at any time" where there had been no assessment. In other words the two remedies of assessment and collection are given in the alternative and a proceeding in court for the collection of a tax was allowed "at any time" only when begun "without assessment."

By permitting a proceeding in court for the collection of the tax, only where no assessment had been made, Congress obviously left open for further treatment a limitation upon proceedings for collection of a tax where an assessment had been made. This limitation appeared in both the 1924 Act and the 1926 Act, in Section 278 (d). In the 1924 Act, Section 278 (d) was limited in subdivi-

sion (e) of that Section, to cases where the assessment had been made after the enactment of that Act (See Appendix) (*Russell vs. United States, supra*).

This Section, in both Acts, permitted proceedings in court for the collection of a tax at any time within six years after the assessment was made, but only, of course, where an assessment had been made within the period of limitation provided in that and other Sections of the Acts. In other respects, this Section in the two Acts was substantially the same, except that the 1924 Act uses the phrase "within the period prescribed in Section 277 or in this Section," whereas, the 1926 Act uses the phrase "within the statutory period of limitation properly applicable thereto." This change of phraseology was adopted throughout the entire 1926 Act, (See Section 278 (d) (e); 311 (b), (c); 1109 (a), (3) and (b) of the 1924 and 1926 Acts), whereas, in the 1924 Act reference was made to specific sections. The obvious purpose of the change was both to obtain uniformity of expression and to avoid an erroneous omission of a section containing a limitation upon an assessment.

With respect to the insertion of the phrase "without assessment" in Section 278 (a) of the 1924 and 1926 Acts, it is important to note that this phrase was also inserted in Section 277 (a), (1), (2), (3) and (4) of the 1926 Act (see appendix), which of course was necessary if there was to be a different limitation period for collection after assessment from the period for assessment.

The Circuit Court of Appeals in its opinion in this case (32 Fed. (2d) 1), stressed the significance of the insertion of this phrase, as follows:

> "Three other amendments were made in 1926, in paragraphs 2, 3, and 4 of the preceding section (277), which are of significance. Prior to the 1926 amendments these paragraphs provided that 'and no proceeding in court for the collection of such taxes shall be begun' after the period fixed in each paragraph for assessment. That is, prior to 1926, the period for assessment or court action were the same; the Government had to assess or sue, or assess and sue, within the particular period, say five years.
>
> "But in 1926 in all three paragraphs the limitation on proceedings in court was qualified by inserting the words 'without assessment,' so that the paragraphs now read 'and no proceeding in court without assessment for the collection of such taxes shall be begun,' etc.
>
> "Take these amendments in connection with 278 (d) quoted above, and the idea of Congress is clear and inescapable. Congress fixed one period (say five years) for the initial move against the taxpayer, whether it be by assessment or suit without assessment, and a different period (6 years) for the second move, distraint or court proceedings, after assessment. For the second move we look to 278 (d) and that alone."
>
> (R. 394, 395).

This phrase "without assessment" was also carried into the limitation provisions affecting estate taxes (Section 311 (a), Revenue Act of 1926) (see appendix), and in what may be termed the general dragnet limitation provisions intended to apply to all revenue taxes, not otherwise specifically provided for. (Section 1109 (a)

(2), Revenue Act 1926) (see appendix). The effect of the insertion of this phrase was recognized in G. C. M. 2939, Cum. Bull. VII-1, p. 144, wherein after setting forth Section 278 (d) and (e) of the Revenue Act of 1924, in discussing the difference in the time limit for "assessment" from the time limit for the "collection" after assessment, Mr. C. M. Charest, General Counsel, says:

> "To the same effect is section 278 (d) and (e) of the Revenue Act of 1926.
>
> "Thus it is apparent that for every case within the purview of the Revenue Act of 1924 a six-year collection period attached after the assessment was made, this regardless of whether the assessment was made before or after the enactment of the Act."

It is quite apparent from the foregoing that Congress intended that after a valid assessment had been made against the taxpayer in any case, whether a return had been filed or not, the time for collecting the tax by proceeding in court was limited to six years from and after such assessment.

It is further contended by the Government that if it should be found in this case that the taxpayer filed no return then under Section 278 (a) the tax could be collected "at any time" and that "at any time" is an unlimited period and therefore cannot be a "statutory period of limitation."

A comparison of Sections 278 (d) and 1109 (b) of the 1924 and 1926 Acts will demonstrate that Congress intended to give to the phrase " within the statutory period of limitation" no such restricted meaning.

In Sec. 278 (d) of the 1924 Act, it is provided:

> "Where the assessment of the tax is made within the period prescribed in Section 277 or in this Section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

When we look for "the period prescribed * * * in this Section," we find that the only "period prescribed" is "at any time."

The word "period" was likewise given the same statutory definition, interpretation or construction in another part of the 1924 Act. In Section 1009 (b) of that Act, it is provided:

> "In case of a false or fraudulent return with intent to evade tax, or a failure to file a required return, or a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

In Sub-division (c) of the same Section, it is provided:

> "Where the assessment of the tax is made within the period prescribed in subdivisions (a) and (b) such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period provided in subdivision (a) for the beginning of such proceeding."

As there was no other "period prescribed" in Subdivision (b) than "at any time," Congress could only have intended that "period" should mean "at any time."

No such narrow, strained or forced construction or interpretation has been indulged in by the Government when its interests required a contrary construction, because in the following General Counsel's Memoranda and Rulings it has been determined that the phrase "statutory period" as used in Section 278 (d) of the Revenue Act of 1926, means the statutory period plus any additional time extended by waivers, even though the waivers were unlimited as to time.

G. C. M. 2513, Ruling VI-45-3496.

G. C. M. 2939, Ruling VII-6-3597.

G. C. M. 2408, Ruling VI-41-3461.

In *Atkins vs. Bender*, 26 Fed. (2d) 690, (D. C. W. D. La.), the court adopted the same view.

That Congress intended that Section 278 (d) should apply to no-return cases, where an assessment might be made at any time, is further evidenced by the proceedings at the hearings before the Committee on Finance of the Senate upon the Revenue Act of 1914, and from the discussion of that provision in the 1926 Act, when same was before the Senate.

This was made quite plain by Mr. A. W. Gregg, then General Counsel of the Bureau of Internal Revenue, at the hearings before the Committee on Finance of the Senate upon the Revenue Act of 1924, when considering the

effect of these provisions as they appeared in Section 1009 (b) and (c) of that Act, quoted, supra, and which are identical with Section 278 (a) and (d) of the same Act, and also as they appeared in Section 278. We set forth the substance of the proceedings as they appear on pp. 39, 40, 41, 49, 50, 51 and 52.

Section 278 (d) of the 1924 Revenue Bill, as it came to the Senate from the House, provided "Where the assessment of the tax is made within the period prescribed in Sec. 277 or in this section, such tax may be collected at any time by distraint or by proceeding in court * * *." In considering this sub-section a discussion arose between Mr. Gregg and various senators (pp. 39-41) as to whether or not there should be a time limit upon the right to collect after an assessment had been made and not leave the time within which the Government may collect open forever, by the use of the phrase "at any time." Action thereon was deferred, but several days later the Committee took up for consideration Section 1009 (b) and (c) of the bill, which was in identical language in that respect with Section 278 (a) and (d). In that discussion (pp. 49-52) several senators insisted that after the Government had made an assessment there should be a limit upon the time within which it might proceed to collect. Thereupon the question arose as to whether this should apply to fraud cases and no-return cases, when the following colloquy took place:

> "Senator King (interposing). You distinguish between cases where a return is filed and where there is no intent to deceive and cases where a man deliberately files no return?

"Mr. Gregg. Yes, sir.

"Senator King. In the first instance you were put on notice and you can inquire and ascertain whether there have been any omissions in the return. In the second instance you have not been put on notice, and your contention is that you should have an indefinite period within which to make your assessment. But do you not think in the latter case, after you have made the assessment, there ought to be a limitation within which you may prosecute to a successful issue your claim for the tax?

"Mr. Gregg. * * * There are cases occasionally where we find a taxpayer has failed to file a return, but sometimes we can not prove deliberate fraud. It seems to me that the statute should not begin to run against the Government until the Government is put on notice in a case of this kind.

"Senator Reed of Pennsylvania. The only offenses against which there are no statute of limitations are murder and treason. Why should we class this offense with those two?

"Mr. Gregg. This is not a penalty for the offense; this is for the collection of the tax. There is a statute of limitations on the criminal penalties.

"Senator Reed of Pennsylvania. This is not a thing that I would debate at any length.

* * * * *

"Senator King. As far as I am concerned, if they put in a provision that, after having made the assessment, there will be a period of limitation of 10 years within which they must prosecute to a successful conclusion—

"Senator Jones of New Mexico (interposing). I think six years would be all right.

"The Chairman. Turn to page 177 of the bill and let us fix both of them at the same time.

"Mr. Gregg. Page 177, line 15, strike out the words 'at any time' and insert 'within six years after the assessment.'"

This intention of Congress to put a limitation of six years upon proceedings for the collection of taxes assessed in those cases where no return had been filed, was again evidenced by the interpretation placed upon Section 278 (d) of the Revenue Act of 1926, when that subdivision was up for discussion before the Senate, after that section, as it appeared in the 1924 Act, had been rewritten by the Senate Finance Committee to make it retroactive, in the language in which it appeared in the 1926 Act as passed.

It has been heretofore shown that "fraudulent return" cases and "no return" cases are coupled together in the same limitation provisions of Section 278, consequently whatever limitation provisions applied to "fraud" cases would necessarily apply to "no-return" cases.

Section 278 (d) of the 1926 Act came up for discussion on the floor of the Senate on February 5th, 1926, after having been reported as rewritten by the Senate Finance Committee, when the following colloquy took place between Senator King of Utah and Senator Reed of Pennsylvania, ranking member of the Senate Finance Committee to the Chairman, and in charge of the bill on the floor of the Senate at the time:

"Mr. Reed of Pennsylvania. Now Mr. President, I ask consideration of the committee amendment at the bottom of page 137.

"The Vice President. The amendment will be stated.

"The Chief Clerk. On page 137, after line 23, the Committee on Finance proposes to strike out:

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun (1) within six years after the assessment of the tax, or (2) at any time prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer.

"(e) This section shall not affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act, nor shall it authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court (1) if at the time of the enactment of this act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) contrary to the provisions of subdivision (a) of section 274.

"And in lieu thereof to insert:

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer.

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the revenue act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this act such assessment, distraint

or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this act the commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this act.

"Mr. King: That relates to fraud, does it not?

"Mr. Reed of Pensylvania: Yes.

"The Vice-President: The question is on agreeing to the amendment.

"The amendment was agreed to."

(Volume 67, No. 43, Congressional Record, 69th Congress, First Session dated Friday, February 5th, 1926, page 3,068).

The House of Representatives had the same understanding of the meaning of this section, because in describing the scope of Section 278 (d) in report No. 1 of the Committee on Ways and Means of the House of Representatives on House Roll No. 1, (Rev. Act of 1926) dated December 7, 1925, at page 12, it was said:

"Sub-division (d) provides that where an assessment of tax is made such tax may be collected by distraint or proceeding in court begun within six years of the assessment of the tax or at any time prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer."

Later after the 1926 Act had passed the Senate and the bill had gone to conference, the Managers on the Part of the House, in making their report of the Conference Committee to the House, in Conference Report to the House of Representatives, No. 356, accepting House Roll

No. 1, dated February 22, 1926, said, on page 42, respecting certain amendments made to Section 278 (d) by the Senate:

> "This amendment rewrites in more definite language, and correcting clerical mistakes, subdivisions (d) and (e) of section 278 of the House bill, dealing with the time within which distraint or proceeding in court may be begun after the assessment has been made."

In the opinion of Honorable T. C. Munger, D. J., herein, 25 Fed. (2d) 746, (R. 68), respecting this feature of the case, it was said:

> "Whether the return was required to be made within three years or no limitation of time was imposed, the assessment was made in the statutory period of limitation applicable thereto."

In the opinion of the Circuit Court of Appeals, in this case (R. 395), in discussing this contention of the Government, it is said:

> "It is vigorously urged that in a no-return case there is no period of limitation for assessment, and therefore, this section does not apply. But the argument does not persuade. *The intent in the words 'within the statutory period of limitation applicable thereto' is too plain for mistake.* This section authorizes the Government to sue after a proper assessment; the Board of Tax Appeals had been created, and Congress wanted to extend the time for suit for a reasonable period after assessment, so that appeals to the board could be prosecuted, etc. But Congress didn't want to give that right to sue if the assessment was barred by the statute when it was made. Therefore Congress qualified the right to sue by providing that the assessment must have been made in time. The assessment here was made in

time, and that phrase has served its purpose." (Our italics)

In the *Florsheim Bros. Dry Goods Co. vs. United States,* (decided by this court February 24, 1930), it is said, respecting this Section in the 1926 Act:

"Section 278 (d) prescribed the period of limitation for the collection of taxes applicable to all cases enumerated in that Section."

II.

The Collection Of The Sum Sought To Be Recovered Herein From The Defendants, As Transferees Of The Assets Of The Updike Grain Company, Is Barred By Section 250 (d) Of The Revenue Act of 1921 And Section 277 Of The Revenue Act of 1924.

Omitting the inapplicable provisions, the above Sections are as follows:

Section 250 (d)—Revenue Act of 1921. (42 Stat. 265)

"The amount of income, excess profits, or war profits taxes * * due under any return made under this act for prior taxable years or under prior income, excess profits, or war profits tax acts, * * shall be determined and assessed within five years after the return was filed, * *; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess profits, or war profits tax acts, * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

Section 277 (a) (2)—Revenue Act of 1924. (43 Stat. 299)

"The amount of income, excess profits, and war profits taxes imposed by * * the Revenue Act of 1917,

> * * and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

The above sections contain limitation provisions in cases where returns were filed and limit proceedings for the collection of the tax, where a return was filed, to five years after the filing of the return. If a return was filed within the meaning of these provisions, the right to collect this tax became barred in August, 1922, and the liability for the tax was extinguished by Section 1106 (a) of the Revenue Act of 1926.

It becomes necessary to ascertain if returns were filed for the Updike Grain Company in 1917, which started the running of the above limitation provisions.

The record shows that the taxpayer had duly "designated a fiscal year for the computation of its tax" pursuant to Section 13 (b) of the Revenue Act of 1916 (39 Stat. 771), and Section 200 of the Revenue Act of 1917 (40 Stat. 302) (see appendix), which ended June 30, 1917 (R. 161).

Both the 1916 Act (Sec. 13 (b)) and the 1917 Act (Sec. 212) (40 Stat. 307) (See appendix) required the taxpayer to "render" "within sixty days after the close of such fiscal year" "a true and accurate return of its annual net income in the manner and form prescribed by the Commissioner of Internal Revenue * * * and containing such facts, data, and information as are appropriate and in the opinion of the Commissioner necessary to determine the correctness of the net income returned

and to carry out the provisions of "Title I (the 2% tax prescribed in Sec. 10) or suffer a penalty of 50% of the tax (Sec. 3176 R. S. as amended by Sec. 16, Revenue Act of 1916).

Both the 1916 Act (Sec. 14 (a)) and the 1917 Act (Secs. 4 and 212) (See appendix) required the taxpayer to pay the tax due upon such return on or before December, 1917, or suffer a 5% penalty and interest at 1% per month thereafter from due date.

The taxpayer filed its returns within sixty days after the close of its fiscal year (R. 165, 171, 175) exactly as required by the Revenue Acts of 1916 and 1917, and paid the tax due within 105 days thereafter or before December, 1917, as was also required by both Acts.

The 1917 Act made no other requirements of the taxpayer respecting the filing of its returns or the time of paying its tax.

The Commissioner on January 2, 1918, after the period fixed by law, within which the taxpayer was required to file its returns, had expired, promulgated regulation 33 (Rev.) Art. 61, providing that:

> "A corporation which was dissolved in 1917, prior to passage of war revenue Act of October 3, 1917, is subject to tax under the Act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the Act of October 3, 1917. (*Brady, et al. v. Anderson,* 240 Fed. 665). Corporations so situated will make a return on revised Form 1031, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a re-

turn covering this period and shall have paid any excess profits tax under the Act of March 5, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the Act of October 3, 1917."

The regulation did not say when such return should be filed, by corporations which had made returns during the year 1917, for a fiscal year ending during that year, and there was no law (other than above stated) or regulation which fixed the time, although there was respecting corporations making returns upon a calendar year basis. Neither did the regulation provide who should sign the returns of a dissolved corporation, nor which "revised Form 1031" was meant. The only one known to taxpayers then was Form 1031 (Revised 1916) which was presumably meant, and upon which form the taxpayer had already made its returns.

Although the law and regulations, existing at the time the taxpayer made its returns and at the time this regulation was promulgated, required two returns, one on Form 1031, revised 1916, termed "Income Tax Return" and another on Form 1103, termed "Excess-Profits Tax Return", the regulation, you will note, did not require the filing of an additional Excess Profits Tax Return on Form 1103, or any other form.

The return made by the taxpayer on revised Form 1031, in August, 1917, was a true and accurate return of its net income in the manner and form then prescribed by the Commissioner of Internal Revenue, and was declared to be such by the Revenue Agent, who by

authority of the Commissioner and Regulation 33, Article 186 (See appendix) made a field audit of same, and of the returns of the taxpayer for several previous years, in October, 1918, because in his report on this audit, he said:

> "From all books and records available, it appeared that the full amount of gross income for each year was reported and no improper deductions taken." (R. 107).

The undisputed record shows the following:

(a) The returns as filed by the Updike Grain Company set forth specifically the gross amount of income from all separate sources of said company for the year 1917 and for the eleven month period ending June 30th, 1917, and the aggregate items of allowance claimed by the company and authorized by law, and the total and entire net income and earnings of the company for such eleven month period and for the periods January 1, 1917, to June 30, 1917, and July 1, 1917, to the date of dissolution of the company in August, 1917, and all other facts, data and information appropriate and necessary to determine the net income and to carry out any applicable provisions of the Revenue Act of October 3, 1917. (R. 165, 171, 175).

(b) No notice, demanding additional returns, was sent to the company as required by Regulation 33, Article 196, supra. (R. 95, 349, 350).

(c) When the Commissioner requested the Revenue Agent in Charge at Omaha to make an audit of the books and records of the company to ascertain the amount of additional tax due, he requested him to audit the 1917 returns of the company which had been filed, and did not claim or advise that no return had been filed. (R. 95).

(d) The Revenue Agent making the audit for the year 1917 asked for, received and used the copies

of the returns filed by the company for that year in making his examination and audit. (R. 350).

(e) The Revenue Agent in Charge and the Revenue Agent making the examination proceeded upon the theory that a return had been made, which their correspondence clearly indicates. (R. 107, 117, 121, 105, 317, 323, 325, 335).

(f) In the report of the Revenue Agent making the examination, he refers to the computations for the year in question as an "*amended return*", which designation was apparently accepted by the Commissioner, because it was upon the figures thus set forth that the Commissioner determined and assessed the tax. (R. 107).

(g) The Revenue Agent making the audit of the returns filed by the taxpayer said in his report:

> "From all books and records available, it appeared that the full amount of gross income for each year was reported and no improper deduction taken." (R. 107).

(h) The Revenue Agent, making the examination and audit of the 1917 returns, prepared "a return" for the Commissioner pursuant to Sec. 14 (a), Revenue Act of 1916, both for the War Income and Excess Profits Tax under the October 3, 1917 Act. (R. 115).

(i) No penalty was assessed against the company for failure to file a return, which it was the duty of the Commissioner under the regulations and law to assess where no return had been filed, and had he not been accepting the returns filed as sufficient. (Sec. 1004, Rev. Act, 1917; Reg. 33, Art. 21; Reg. 33, Art. 197; Reg. 33, (Rev.) Art. 214, para. 629). (R. 148) (See Appendix for Statute and Regulations)

(j) In a letter dated April 27, 1923, from the Collector of Internal Revenue, Omaha, Nebraska, to

the Commissioner of Internal Revenue, attention is called to this tax, and in that letter it is stated:

> "It is claimed by the taxpayers that they made returns for the part of the year 1917 up to the time of the dissolution." (R. 225).

(k) The Solicitor of Internal Revenue in his opinion of May 4th, 1923, recognized the fact that returns had been filed for the period in question. (R. 233).

(l) The Bureau of Internal Revenue and the Department of Justice, in the suit brought against Mr. Updike to recover the taxes assessed against the Missouri Valley Elevator Company, recognized that the returns filed by that company, which were of like character to the returns filed for the Updike Grain Company, were sufficient returns to start the running of the statute of limitations in cases where returns had been filed, had they not charged them to be "incorrect, misleading and false in law." (R. 361).

It appears from the foregoing that the returns filed by the company were recognized as sufficient under the October, 1917, Act, (1) by the Collector of Internal Revenue at Omaha; (2) by the Commissioner of Internal Revenue, in directing a revenue agent to make the investigation, who was empowered to do so only in cases where returns were made; (Reg. 33, Art. 186; Treas. Dec. 1932, para. 5; Reg. 33 (Rev.) Art. 221, para. 639; Reg. 45, Art. 1012) (See appendix) (3) by the Revenue Agent in Charge at Omaha; (4) by the Revenue Agent making the investigation and audit; (5) by the Solicitor for the Bureau of Internal Revenue; (6) by the Proving and Audit Divisions in endorsing the additional assessment on the return; and (7) by the Commissioner of Internal Revenue

in making the assessment, as so endorsed; and (8) by the Department of Justice in the Missouri Valley Elevator Company case.

As a result of the foregoing the taxpayer, and likewise the former officers and stockholders, had the right to assume, and at all times did assume, that the returns as filed were sufficient. By the conduct of the various governmental officers recited above, the taxpayer and the stockholders and transferees were lured and lulled into the belief and security that the company had complied with all the rules, regulations and laws respecting returns, for its income for the year 1917, and had thereby escaped any penalties or disadvantages imposed upon one not filing returns.

Tucker vs. Alexander, 275 U. S. 228.

Zeller vs. United States, 35 Fed. (2d) 870.

Ritter vs. United States, 28 Fed. (2d) 265.

Union Trust Company vs. McCaughn, 24 Fed. (2d) 459.

If it should be held that the returns filed by the taxpayer were not sufficient to start the running of the limitation provisions in Sections 250 (d) and 277, quoted above, then we contend that the returns prepared by the Commissioner of Internal Revenue, through the Revenue Agent and the Revenue Agent in Charge in Omaha, in October, 1918, and forwarded to the Commissioner of Internal Revenue by the Revenue Agent in Charge, under date of October 26th, 1918, was "a return" within the meaning of Section 278 (a) of the 1924 and 1926 Acts,

(See appendix) as was held in the opinion of the District Court by Honorable T. C. Munger, D. J. (R. 68), pursuant to the authority of the following provisions of the Revenue Act of 1916, and the regulations cited:

Section 14 (a) of the Revenue Act of 1916 (39 Stat. 772):

> " * * * That every corporation, * * * computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within one hundred and five days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, * * * in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this title or by existing law; * * * *Provided,* That upon the examination of any return of income made pursuant to this title, * * * if it shall appear that amounts of tax have been paid in excess of those properly due, the taxpayer shall be permitted to present a claim for refund thereof notwithstanding the provisions of section thirty-two hundred and twenty-eight of the Revised Statutes;"

Section 14 (b) of the Revenue Act of 1916 (39 Stat. 772):

> "When the assessment shall be made, as provided in this title, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue * * * "

The same authority to the Commissioner to make returns is found in various regulations in force at the time

the Commissioner made returns in the instant case, particularly in the following:

Regulation 33, Article 177.

Regulation 33, Article 184.

Regulation 33 (Revised), Article 42, Paragraph 253.

If it be claimed that this case does not come within the provisions of Section 277 or Section 278 of the Revenue Act of 1926, then it must be governed by Section 1109 (a) (1), (2) and (3), (44 Stat. 114), which is the dragnet limitation section intended to cover all cases for which there is no specific provision. The sub-divisions of this section are as follows:

"(a) Except as provided in sections 277, 278, 310 and 311—

"(1) Notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, all internal-revenue taxes shall (except as provided in paragraph (2) or (3) of this subdivision) be assessed within four years after such taxes became due, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes became due.

"(2) In case of a false or fraudulent return with intent to evade tax, of a failure to file a return within the time required by law, or of a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time.

"(3) Where the assessment of any tax imposed by this Act or by prior Act of Congress has been

made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (A) within six years after the assessment of the tax, or (B) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

III.

If The Collection Of These Taxes From The Updike Grain Company, At The Time These Proceedings Were Begun, Is Barred By The Limitations Contained In Any Of The Revenue Acts, This Suit Cannot Be Maintained Against The Transferees As An Independent Suit For The Recovery Of Trust Funds.

The attempted application by the Government of the "trust fund theory" to this case, will not authorize the prosecution of the suit, if it is determined by the court that a suit against the taxpayer would have been barred by the provisions of Sec. 278 (d) of the Revenue Act of 1926, or by any earlier provisions of the revenue law, for the reason that the trust fund theory, in the form propounded by the Government in its argument, has been expressly repudiated by this court in *Graham vs. Railroad Co.*, 102 U. S. 148; *Fogg v. Blair*, 133 U. S. 534; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371; *McDonald v. Williams*, 174 U. S. 397; *Pierce v. United States*, 255 U. S. 398, and by state decisions in *Shaw v. Robinson & Stokes*. 50 Neb. 403; *Coleman v. Hagey*, 252 Mo. 102; *Leudecke v. Des Moines Co.*, 140 Ia. 223, and *Hospes v. N. W. Mfg. Co.*, 48 Minn. 174, as well as in numerous other decisions. It does not apply to this case in any event, because the primary question here is not

the application of a statute of limitations to the suit against the transferees, but to the absence, in complainant's case, of a fundamental prerequisite for the prosecution of a suit against the transferee, to-wit, the existence of a present enforceable claim against the transferor. But, in any case, a suit against the transferee is a proceeding in court for the collection of a tax within the meaning of Sec. 278 (d), as appears from the Government's petition in this case (R. 8), even after it had been amended for the purpose of converting it into a general equity suit (R. 12-155, 6, 7-160), because it is based upon the averment that the tax accrued against the taxpayer, and that the property in the hands of the transferees is liable to the payment of that tax, and the prayer is that the amount of the tax be recovered. As such a suit is, in its essence, a creditor's bill, it is ancillary to the claim upon which it is based, and a part of the proceedings for the collection of the tax. A creditor's bill has been called an equitable execution, and whether it is invoked in aid of the collection of a judgment at law, where execution fails, or in aid of the collection of a tax against the transferor, if such a suit is permissible without a judgment at law, it remains essentially an ancillary proceeding, which, in no case, can rise higher than its source, or be enforceable after the claim upon which it is founded ceases to be enforceable against the transferor. *Merchants Nat. Bk. vs. McDonald,* 63 Neb. 363; *Pierce vs. United States,* 255 U. S. 398; *Dole vs. Wilson,* 39 Minn. 330; *Flagg vs. Flagg,* 39 Neb. 229; *Holmes v. Webster,* 98 Neb. 105; *Fisher v. Woodard,* 103 Neb. 253; *Newell v. Dart,* 28 Minn. 243; *Scott v. Neely,* 140 U. S. 106; *Bank v. Braithwaite,* 7 N. Dak. 352; *Mc-*

Aleer v. Clay Co., 42 Fed. 665; *Board v. Tome*, 153 Fed. 81; *Gen. Elec. v. Hurd*, 171 Fed. 984; *Mullen v. Hewitt*, 103 Mo. 639.

IV.

The Assets Of The Updike Grain Company Were Transferred To The Respondents Herein In August, 1917; The Liability For The Tax Did Not Arise In Any Event Until The Passage Of The Revenue Act of 1917, On October 3, 1917, And This Suit Against Such Transferees Cannot Be Maintained, Because The Government Thereby, If At All, Became A Creditor For Such Tax Subsequent To The Time The Transferees Received The Assets, There Being At The Time Of Transfer No Tax Liability Nor An Existing Statute Under Which A Tax Liability Could Arise.

No claim is made against the respondents solely because they are stockholders of the corporate taxpayer, it is not claimed that there is any statute of the State of Nebraska, where the corporation is organized, that makes them liable, and there is no statute of the United States which makes them liable as stockholders, or as transferees of the corporate assets; not even Sec. 280 attempts either to create or enlarge the liability of transferees of assets, but merely regulates a procedure for enforcing by summary process whatever existing liability there may be at law or equity. Necessarily, therefore, whatever liability exists is that which grows out of the laws of Nebraska, including such general rules of law as are construed and defined in the courts of the United States with reference to transactions arising under the laws of the State of Nebraska. The liability to creditors growing out of the transfer of assets of a corporation to its stockholders is, in a proceeding of this character, precisely the same as the liability of the transferee of assets of an individual. (*Graham v. Railroad Co.*, 102 U. S. 148;

Hollins v. Brierfield, 150 U. S. 371; *Pierce v. United States,* 255 U. S. 398). It is only when a court of equity has taken over the liquidation of a corporation, that there is any trust which differs from the status of the transferred assets of an individual debtor and the claims of the creditors. In each case the right of the creditor to pursue the assets is a remedy granted to the creditor because of the inadequacy of legal remedies, either because a judgment at law and the failure of execution has demonstrated the insufficiency of the legal remedies, or because a court of equity, in administering the remedy directly, without a prior judgment at law, has become satisfied that there is no remedy in the proceedings at law, and that the remedies in equity are therefore available. But it is universally held in the decisions defining and enforcing this equitable remedy, that it is available only to a creditor existing at the time of the transfer. This is true whether the transfer was fraudulent as against existing creditors, or whether it was only voluntary, and therefore capable of being set aside by existing creditors. But in no case is the remedy available to a subsequent creditor, unless, in some jurisdictions he can allege and prove that the transfer was made in contemplation of a debt to be contracted and was intended as a fraud upon such creditor. In this case there is no allegation of any intention on the part of the corporation or its stockholders to defraud the Government by distributing its assets and dissolving in August, 1917, but, on the contrary, the averment is that the dissolution was "duly" made (R. 9), that the resolution of the stockholders providing for dissolution of the corporation and the transfer of its assets was "duly" adopted by the

stockholders, and that thereafter (R. 10) legal steps to complete the dissolution were "duly" taken. Of course the meaning of the word "duly" is that the steps were lawfully taken, (Century Dictionary, Standard Dictionary, 19 C. J. 833, *State Bank v. Morse*, 60 Kas. 526; *Robertson, Col. v. Perkins*, 129 U. S. 333) and it is no where alleged that they were taken unlawfully and for the purpose of defrauding the Government, nor is there any proof whatever to that effect. The averment in the Government's petition that the action of the corporation was "duly" taken, applies as well to the resolution directing the distribution of the assets among the stockholders, as to the technical steps relating to the dissolution itself.

The right to pursue the assets of a debtor to satisfy the claims of a creditor, as distinguished from the procedure, is based upon Statute 13, Eliz. c5, and the various statutes of the states re-enacting that statute, with modifications or enlargements. (*Sexton v. Wheaton*, 8 Wheat. 229; *Mattingly v. Nye*, 8 Wall. 370; *Graham v. Railroad Co.*, 102 U. S. 148; *Hollins v. Brierfield*, 150 U. S. 371; *Shaw v. Robinson & Stokes*, 50 Neb. 403; *Hospes* v. *N. W. Mfg. Co.*, 48 Minn. 174). And under these decisions, the right of the creditor is grounded upon the statute, and applies alike to the creditors of an individual and the creditors of a corporation.

If the action against the taxpayer was barred by Sec. 278 (d) of the Revenue Act of 1926, then the Government cannot succeed in this proceeding, because it lacks an essential element in its case, that is, a debt existing at the time of the suit, and whether barred by that sec-

tion or not, the Government cannot recover against the stockholders, because it is a subsequent creditor, and not in a position to attack a bona fide transfer completed before the Government's claim was even authorized by a statute.

While it is true that the decisions of various district courts and circuit courts of appeal are to the effect that a corporation lawfully (that is "duly") dissolved in 1917, prior to the passage of the act of October 3, 1917, is liable to the increased tax imposed by that act, yet this court has no where so decided, and its refusal to grant a certiorari in the first case of *Updike v. United States*, 8 Fed. (2nd) 913, 271 U. S. 661, does not imply any approval by this court of the decisions of the district or circuit court in that case, and certainly not in any of the other cases which did not reach this court. (*United States vs. Carver*, 260 U. S. 482).

V.

The Provisions Of The Revenue Act Of October 3, 1917, Are Not Applicable To A Corporation Which Was Lawfully Dissolved Under State Law, After Having Discharged All Its Existing Obligations And Distributed All Its Assets Among Its Stockholders, Prior To The Enactment Of The Suit.

In accordance with the first ruling made by the Commissioner of Internal Revenue in October, 1917, after the passage of the act (R. 187), the stockholders of the Updike Grain Company have contended that the act of October 3, 1917, was not applicable to a corporation which was dissolved before the act was passed, because, whether it was in the power of Congress or not, no intention was shown in that act to revive a dissolved corporation

for the purpose of taxing it. By the final section of the act, 40 Statutes at Large, 338, §1302, it was provided that, unless as otherwise provided in the act, it should take effect and be in force on the day after its passage, and as it was passed on October 3, 1917, it took effect and became in force on October 4, 1917. So far as affects this controversy, the only feature of the act which could be called retroactive, are the provisions of Sections 4 and 200 of the act, (40 St. at L. 302) to the effect that the first taxable year under the act should be the year 1917, and that for corporations having a fiscal year, the first taxable year should be the fiscal year ending during 1917. That Congress thereby declared an intention of applying the terms of the act to all incomes during any part of the calendar year 1917, is conceded, but the contention of the stockholders at all times has been that the statute no where evinced an intention of taxing corporations which had passed out of existence, nor the transferees or stockholders of such corporations, conceding to the fullest extent the power of Congress to do so, if it had indicated its intention to take such action. The income tax is a personal tax; it is in no sense a levy upon specific property. All the provisions of the law indicate that it creates a personal liability on the part of persons and corporations, and its failure to specify that its terms are applicable to the stockholders of dissolved corporations, under the familiar rule that a tax statute will not be extended by implication, means that a tax was not assessable on account of income received by a then defunct corporation. *Smietanka v. Trust & Savings Bank,* 257 U. S. 602; *Schwab v. Doyle,* 258 U. S. 529; *Union Trust Co. v. Wardell,* 258 U. S. 537; *Gould v. Gould,* 245 U. S. 151,

Anderson v. Railway Co., 216 Fed. 83 (C. C. A. 2d Circuit), (Excise Tax of 1909); *Scott v. Railway Co.*, 246 Fed. 545 (C. C. A. 9th Circuit); *Pa. Steel Co. v. Railway Co.*, 198 Fed. 774 (C. C. A. 2d Circuit).

For the foregoing reasons we submit that the decrees and judgments of the District Court and the Circuit Court of Appeals, herein, are correct and should be affirmed.

Respectfully submitted,

WARREN H. HOWARD,

FRANCIS A. BROGAN,

ALFRED G. ELLICK,

Solicitors for Respondent,
GEORGE A. ROBERTS.

APPENDIX

Revenue Act of 1916

Section 13 (b) Revenue Act of 1916 (39 Stat. 771):

"(b). Every corporation, joint-stock company or association, or insurance company, subject to the tax herein imposed, shall, on or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, or, if it has designated a fiscal year for the computation of its tax, then within sixty days after the close of such fiscal year ending prior to December thirty-first, nineteen hundred and sixteen, and the close of each such fiscal year thereafter, render a true and accurate return of its annual net income in the manner and form to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and containing such facts, data, and information as are appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title. The return shall be sworn to by the president, vice-president, or other principal officer, and by the treasurer or assistant treasurer. The return shall be made to the collector of the district in which is located the principal office of the corporation, company, or association, where are kept its books of account and other data from which the return is prepared, or in the case of a foreign corporation, company, or association, to the collector of the district in which is located its principal place of business in the United States, or if it have no principal place of business, office, or agency in the United States, then to the collector of internal revenue at Baltimore, Maryland. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue."

Revenue Act of 1917

Section 4, Revenue Act of 1917 (40 Stat. 302):

"That in addition to the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four percentum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, joint-stock company or association, or insurance company, subject to the tax imposed by that subdivision of that section, except that if it has fixed its own fiscal year, the tax imposed by this section for the fiscal year ending during the calendar year nineteen hundred and seventeen shall be levied, assessed, collected, and paid only on that proportion of its income for such fiscal year which the period between January first, nineteen hundred and seventeen, and the end of such fiscal year bears to the whole of such fiscal year.

"The tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax imposed by subdivision (a) of section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, except that for the purpose of the tax imposed by this section the income embraced in a return of a corporation, joint-stock company or association, or insurance company, shall be credited with the amount received as dividends upon the stock or from the net earnings of any other corporation, joint-stock company or association, or insurance company, which is taxable upon its net income as provided in this title."

Section 200, Revenue Act of 1917 (40 Stat. 302):

"That when used in this title—

* * * * *

The term 'taxable year' means the twelve months ending December thirty-first, excepting in the case of

a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year. The first taxable year shall be the year ending December thirty-first, nineteen hundred and seventeen, except that in the case of a corporation or partnership which has fixed its own fiscal year, it shall be the fiscal year ending during the calendar year nineteen hundred and seventeen. If a corporation or partnership, prior to March first, nineteen hundred and eighteen, makes a return covering its own fiscal year, and includes therein the income received during that part of the fiscal year falling within the calendar year nineteen hundred and sixteen, the tax for such taxable year shall be that proportion of the tax computed upon the net income during such full fiscal year which the time from January first, nineteen hundred and seventeen, to the end of such fiscal year bears to the full fiscal year; * * *."

Section 212, Revenue Act of 1917 (40 Stat. 307):

"That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed, and not inconsistent with the provisions of this title are hereby extended and made applicable to all the provisions of this title and to the tax herein imposed, and all provisions of Title I of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, relating to returns and payment of the tax therein imposed, including penalties, are hereby made applicable to the tax imposed by this Title."

Section 1004, Revenue Act of 1917, (40 Stat. 325):

"That whoever fails to make any return required by this Act or the regulations made under authority thereof within the time prescribed or who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this

Act or fails to collect or truly to account for and pay over any such tax, shall be subject to a penalty of not more than $1,000, or to imprisonment for not more than one year, or both, at the discretion of the court, and in addition thereto a penalty of double the tax evaded, or not collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected, in any case in which the punishment is not otherwise specifically provided."

—o—

Revenue Act of 1924

Section 278 (a) (d) (e), Revenue Act of 1924 (43 Stat. 299):

"(a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

—o—

Revenue Act of 1926

Section 277 (a) (1) (2) (3) (4), Revenue Act of 1926 (44 Stat. 58):

"(a) Except as provided in section 278—

"(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

" (4) In the case of income received during the lifetime of a decedent, the tax shall be assessed, and any proceeding in court without assessment for the collection of such tax shall be begun, within one

year after written request therefor (filed after the return is made) by the executor, administrator, or the fiduciary representing the estate of such decedent, but not after the expiration of the period prescribed for the assessment of the tax in paragraph (1), (2), or (3) of this subdivision."

Section 278 (a) (d) (e), Revenue Act of 1926 (44 Stat. 59):

"(a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Section 280 (a) (1) (b) (1) (2), Revenue Act of 1926 (44 Stat. 61):

"(a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

"(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

"(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

"(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

"(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period,—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act."

Section 311 (a), Revenue Act of 1926. (44 Stat. 77):

"(a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

Section 1109 (a) (2), Revenue Act of 1926 (44 Stat. 114):

"(a) Except as provided in sections 277, 278, 310, and 311—

"(2) In case of a false or fraudulent return with intent to evade tax, of a failure to file a return within the time required by law, or of a willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

—o—

Regulations

Reg. 33, Art. 21:

"In case any perso liable to make return shall neglect or refuse to make or render a list or return, or shall render a willfully false or fraudulent return, it shall be the duty of the collector, after due notice has been given, to make such list, according to the best information he can obtain by the examination of such person, or any other evidence.

"When duly certified by the collector, the said list thus prepared shall be the return of said person and the tax so ascertained to be due, together with 50 per cent or 100 per cent penalty incurred, shall be assessed and collected."

Reg. 33, Art. 186:

"For the purpose of verifying any return, made pursuant to this act, the Commissioner of Internal Revenue may, by any duly authorized revenue agent or deputy collector, cause the books of such corporation to be examined, and if such examination discloses that the corporation is liable to tax in addi-

tion to that previously assessed, or assessable, the same shall be assessed and shall be payable immediately upon notice and demand. For the purpose of such examination, the books of corporations shall be open to the examining officer, or shall be produced for this purpose upon summons issued by any properly authorized officer."

Reg. 33, Art. 196:

"Where the required returns are not filed within the prescribed time, either by individuals or corporations, notice on Form 1045 should in each case be sent to the delinquent."

Reg. 33, Art. 197:

"When assessment has been made, collectors will, on receipt of their returned lists, at once issue preliminary notices of assessment (Form 647), and where in any case the tax assessed is not paid on or before the 30th day of June, or in case of corporations designating their own fiscal year, within 120 days following the date on which the return should have been filed, notice and demand (Form 17) should be at once issued, and unless the tax in such case is paid within 10 days after the service of such notice, general demand for tax, penalty, and interest (Form 21) should at once be issued. Immediate notice and demand (Form 17) will, however, be served in case of failure to file the required return within the statutory period."

Reg. 33 (Rev.), Art. 214, Para. 629:

"When a corporation has, in the manner provided by law, established a fiscal year other than the calendar year as the basis for making its return, it is bound by such action to make its returns on such basis until such fiscal year be properly changed. Failing to make its returns on the basis designated and

within the prescribed time will subject the corporation to the penalties imposed by this title for delinquency." (T. D. 2001, 2029, 2090, 2137).

Reg. 33 (Rev.), Art. 221, Para. 639:

"For the purpose of verifying the accuracy of a return, or for making one where none is made, the books of corporations and all other relative data shall be open to the inspection of the Commissioner of Internal Revenue or his duly authorized agents."

Reg. 45, Art. 1012:

"When the returns are received at the collectors' offices, they are examined and listed before being forwarded to the Commissioner. If it appears that the tax is greater or less than shown in the return, it is recomputed. After checking the figures the Commissioner assesses the tax on the basis of the collectors' lists. The collectors then send out bills for the taxes, either as computed by the taxpayer or as recomputed. If a taxpayer believes that he has been overassessed, he may file a claim for abatement or (after payment of the tax) for a refund of the excess. See section 252 of the statute and articles 1031-1038. As soon as practicable the returns are carefully audited by accountants in the office of the Commissioner at Washington, assisted where necessary by reports of the examination of taxpayers' books and records made by revenue agents in the field. If error in a return is detected, the taxpayer is notified accordingly and an additional assessment is made against him or he is given the opportunity to file a claim for a refund, as the case may be. Any assessment must be made within five years after the return was due or was made, except in the case of false or fraudulent returns with intent to evade the tax. See sections 228, 1305 and 1310 of the statute and articles 451 and 1711."

Regulations 33 were issued January 5, 1914.

Regulations 33 (Rev.) were issued January 2, 1918.

Regulations 45 were issued April 17, 1919.

SUPREME COURT OF THE UNITED STATES.

No. 340.—October Term, 1929.

The United States of America, Petitioner, *vs.* Nelson B. Updike, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 19, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

Prior to the passage of the Revenue Act of 1917, the Updike Grain Company, a Nebraska corporation, filed its income tax and excess profits tax returns for the eleven months ending June 30, 1917, that being the end of the fiscal year which the corporation had selected as its annual period for federal taxation. The returns in form complied with the provisions of the law then in force, and were correct in point of fact. The full amount of the tax, as shown by the returns, was paid. In August, 1917, the corporation was lawfully dissolved and its assets, after payment of all debts, were distributed among its stockholders. Shortly after the passage of the Revenue Act of October 3, 1917, which, among other changes, increased the rate of taxation, the Commissioner of Internal Revenue issued a regulation providing that corporations which had dissolved in 1917 prior to the date of that act, should file tax returns in accordance with its provisions for the period preceding dissolution. A blank form for that purpose was mailed to the corporation, but was returned by its former secretary unexecuted with the information that the corporation, prior to its dissolution, had filed tax returns and paid all taxes due under existing laws.

In October, 1918, a revenue agent examined the books of the corporation and made a return in regular form, upon which, in January, 1920, additional income and excess profits taxes were assessed for the period ending June 30, 1917. The return so made was not verified or signed in behalf of the corporation, or otherwise. The present suit to recover the amount was brought against respon-

dents, stockholders of the corporation, in 1927, more than seven years after the assessment. The theory upon which the suit was begun and prosecuted is, that the assets of the corporation distributed to the stockholders, to the extent of the additional taxes, became trust funds received to the use of the United States. The federal district court entered a decree dismissing the bill. 25 F. (2d) 746. Upon appeal the circuit court of appeals affirmed the decree upon the ground that the suit was barred by the provisions of § 278 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59; U. S. C. Supp., Title 26, §§ 1058, 1060, 1061. 32 F. (2d) 1.

The principal question presented here, and the only one we need consider, is whether the suit, having been brought more than six years after the assessment, was barred by the provisions of § 278 quoted below.

"(a) In the case . . . of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

. . . . . .

"(d) Where the assessment . . . . has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, ..." U. S. C. Supp., Title 26, §§ 1058, 1061.

In accordance with the claim of the government, the court below held that there was a failure to file a return within the meaning of paragraph (a). See also *Updike* v. *United States*, 8 F. (2d) 913. We assume without deciding the correctness of that view and consider the case accordingly.

The government contends—(1) that § 278(d) relates only to proceedings to collect taxes *qua* taxes, and not to suits in equity to recover "trust funds," and that the present suit is of the latter character; but (2) that the present case is not within the provisions of that section even if a suit against the stockholders be controlled by the same rule as a proceeding against the corporation itself.

First. The first point turns upon the question whether this is a proceeding to collect a tax, as to which it is said that the provision of § 278(d) that "such tax may be collected . . . by a proceeding in court," etc., refers only to a direct proceeding against

the taxpayer; and that this view is borne out by a consideration of § 280 (c. 27, 44 Stat. 9, 61; U. S. C. Supp., Title 26, § 1069),* which prescribes a mode of procedure against transferees of the property of a taxpayer.

The contention is that by the language of § 280 Congress has clearly differentiated between taxpayers and transferees by referring to the liability of the latter as "the liability at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed upon the taxpayer", and then, apparently realizing that the limitation periods as to the collection of taxes *qua* taxes would have no application to the remedy against transferees, creating a distinct period of limitation in respect thereof.

This view of the statute is not admissible. The plain words of § 280(a) are, that, "except as hereinafter in this section provided," the liability of the transferee shall be "assessed, collected, and paid" subject, among other things, to the same "provisions and limitations as in the case of a deficiency in a tax imposed by this

*Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.

. . . . . .

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

. . . . . .

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

title (including . . . the provisions authorizing . . . proceedings in court for collection . . .)." Nothing thereinafter provided in that section affects the application to the present case of these general words in respect of limitations, for, while the succeeding paragraphs contain provisions of limitation in respect of assessment, they contain none in respect of collection. It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from § 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of § 278(d) in relation to the period of limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word "taxpayer" to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.

Second. It follows that if by § 278(d) the period of limitation had run in favor of the corporation, it had run in favor of the transferees. The contention of the government that the section does not apply under the facts of the present case, depends upon the meaning of the phrase which we have italicized: "Where the assessment . . . has been made . . . *within the statutory period of limitation properly applicable thereto,* such tax may be collected . . . by a proceeding in court . . . but only if begun (1) within six years after the assessment of the tax . . ." The argument, in effect, is this: In 1920 when the assessment was made, there was, and had been, no provision of law which in any form limited the time for assessing or collecting taxes, and, therefore, an assessment in 1920 of 1917 taxes could not fulfil the requirements of § 278(d), because, in that view, there was no "statutory period of limitation properly applicable thereto;" and, assuming the applicability of statutes passed after 1920, the provision in these statutes is that the assessment may be made "at any time," and that is not a *period* of limitation within the meaning of § 278(d), for the

word "period" connotes a stated interval of time commonly thought of in terms of years, months and days.

The clear intent of § 278, as applied to the facts of the present case, was to designate the extent of time for the enforcement of the tax liability. Where, in a "no return" case, an assessment, which, under paragraph (a), may be made at any time, has in fact been made, a proceeding to collect must be begun within six years thereafter; but where there has been no assessment, the proceeding may be begun at any time. In the present case there was an assessment, and it would not be doubted that the suit was barred at the expiration of the six-year period of limitation, unless for the presence of the words italicized above. Have these words the effect of averting the bar? We think not. An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought.

In the light of that policy, it seems reasonably clear that the saving clause, "within the statutory period of limitation properly applicable thereto," was inserted solely for the protection of the taxpayer—that is to say, in order to preclude collection of the tax even within six years after the assessment, if that assessment, when made, was barred by the applicable statutory limitation. This conclusion is confirmed, if confirmation be necessary, by the provisions of paragraph (a), which clearly contemplate that the six-year period shall apply, except where the proceeding to collect is brought "without assessment," in which event it may be brought "at any time."

It may be that the saving clause was not strictly necessary, but was inserted from excessive care to put the right of the taxpayer beyond dispute. In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349.

This disposes of the case and it becomes unnecessary to determine whether the phrase, "at any time," imports a "period of limitation," or to consider other questions presented in argument.

Decree affirmed.